16B Am. Jur. 2d Constitutional Law XIII B Refs.

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Constitutional Law
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XIII. Equal Protection of the Laws; Class Legislation

B. Protection Against Special Burdens or Privileges

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Research References

West's Key Number Digest

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16B Am. Jur. 2d Constitutional Law § 913

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XIII. Equal Protection of the Laws; Class Legislation

B. Protection Against Special Burdens or Privileges

§ 913. Constitutional provisions prohibiting special burdens or privileges

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West's Key Number Digest

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The theory underlying constitutional requirements of equality is that all persons in like circumstances and like conditions must be treated alike both as to privileges conferred and as to liabilities or burdens imposed.[1] The organic principle of equality includes within its application a granted privilege as well as a regulated right. Equality of benefit is required no less than equality of burden.[2]

Every citizen should share the common benefits of a government the common burdens of which he or she is required to bear. Thus, legislation granting special privileges and imposing special burdens may conflict with the Equal Protection Clause of the Federal Constitution,[3] as well as with the more specific provisions of some state constitutions, which, although varying slightly in terminology, have the general effect of prohibiting the granting of special privileges or immunities.[4] So long as all are treated alike under like circumstances, however, neither the federal nor the state provisions are violated.[5] General rules that apply evenhandedly to all persons within a jurisdiction comply with the Equal Protection Clause;[6] only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether equal protection is violated arise.[7] It would thus appear that particular laws granting special privileges and immunities must run the gauntlet between the provisions of the Federal Constitution which secure the equal protection of the laws and those of state constitutions which prohibit either special legislation or special laws granting privileges and immunities and also that the inherent limitations on legislative power may themselves be sufficient to nullify such laws.[8]

Observation:

There are two remedial alternatives when a statute, in violation of equal protection principles, benefits one class and excludes another from the benefit: a court may either declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. The

choice between the two alternative remedial outcomes is governed by the legislature's intent, as revealed by the statute at hand. In considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation, a court should measure the intensity of commitment to the residual policy, that is, the main rule, not the exception, and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.[9]

Footnotes

1 § 826.

2 Carozza v. Federal Finance & Credit Co., 149 Md. 223, 131 A. 332, 43 A.L.R. 1 (1925); Rosenblum v. Griffin, 89 N.H. 314, 197 A. 701, 115 A.L.R. 1367 (1938).

3 Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943 (1928), aff'd, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221, 65 A.L.R. 939 (1929); Decker v. Pouvailsmith Corp., 252 N.Y. 1, 168 N.E. 442 (1929); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S.E. 141, 12 A.L.R. 1121 (1920).

4 § 914.

5 Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402, 110 A.L.R. 1479 (1937); Mammina v. Alexander Auto Service Co., 333 Ill. 158, 164 N.E. 173, 61 A.L.R. 649 (1928); Bolivar Tp. Board of Finance of Benton County v. Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271 (1934).

6 New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979); Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC, 2015 UT 87, 361 P.3d 91 (Utah 2015).

7 New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979); Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997).

8 Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465, 50 A.L.R. 1518 (1927); State v. Savage, 96 Or. 53, 184 P. 567 (1919), opinion adhered to on denial of reh'g, 189 P. 427 (Or. 1920).

9 Sessions v. Morales-Santana, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017) (observing that ordinarily, extension of benefits, rather than nullification, is the proper course).

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XIII. Equal Protection of the Laws; Class Legislation

B. Protection Against Special Burdens or Privileges

§ 914. Constitutional provisions prohibiting special burdens or privileges—State constitutional provisions as to special privileges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3000, 3006, 3035, 3036, 3039, 3041, 3043

Provisions to be found in the constitutions of many states have the general effect of prohibiting the grant of special privileges or immunities.[1] Such guarantees in the state constitutions are in nature simply a protection of those fundamental or inherent rights which are common to all citizens; they have been described as being the antithesis of the 14th Amendment since the latter operates to prevent abridgment by the states of the constitutional rights of citizens of the United States and the former prevents the state from granting special privileges or immunities and exemptions from otherwise common burdens. One prevents the curtailment of the constitutional rights of citizens, and the other prohibits the enlargement of the rights of some in discrimination against others.[2] However, the tests as to the granting of special privileges and immunities by a state are substantially similar to those used in determining whether the equal protection of the laws has been denied by a state.[3]

The general principle involved in constitutional equality guarantees forbidding special privileges or immunities seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of an immunity to those not subject to it.[4] Such provisions of the state constitutions permit classification if it is not arbitrary, is reasonable, and has a substantial basis and a proper relation to the objects sought to be accomplished.[5] A state constitutional provision that no member of the state shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his or her peers, prohibits class legislation but does not forbid classification so long as it is not unreasonable or arbitrary.[6]

Observation:

In determining the scope of the class singled out by a statute for special burdens or benefits, a court will not confine its view to the terms of the specific statute but will judge its operation against the background of other legislative, administrative, and judicial directives which govern the legal rights of similarly situated persons.[7] A constitutional provision prohibiting the grant of special privileges applies to municipal ordinances as well as to acts of the legislature.[8]

CUMULATIVE SUPPLEMENT

Cases:

The purpose of state constitutional privileges and immunities clause is to limit the sort of special-interest favoritism that ran rampant during the territorial period. Wash. Const. art. 1, § 12. Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc., 475 P.3d 164 (Wash. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402, 110 A.L.R. 1479 (1937); Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 43 Cal. Rptr. 329, 400 P.2d 321 (1965); Young v. Indiana Dept. of Correction, 22 N.E.3d 716 (Ind. Ct. App. 2014); Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019); State v. Davis, 237 Or. App. 351, 239 P.3d 1002 (2010), aff'd by an equally divided court, 353 Or. 166, 295 P.3d 617 (2013); Madison v. State, 161 Wash. 2d 85, 163 P.3d 757 (2007).
While there is no such express prohibition in the Florida Constitution, special privileges or immunities may be granted only to advance a public purpose as distinguished from a private interest or purpose. Liquor Store v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

2 Bolivar Tp. Board of Finance of Benton County v. Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271 (1934); Savage v. Martin, 161 Or. 660, 91 P.2d 273 (1939).

3 State Board of Tax Com'rs of Ind. v. Jackson, 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A.L.R. 1464, 75 A.L.R. 1536 (1931); Rosenblum v. Griffin, 89 N.H. 314, 197 A. 701, 115 A.L.R. 1367 (1938); Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958).

4 Tipton County v. Rogers Locomotive & Machine Works, 103 U.S. 523, 26 L. Ed. 340, 1880 WL 18893 (1880); Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465, 50 A.L.R. 1518 (1927).

5 Mansur v. City of Sacramento, 39 Cal. App. 2d 426, 103 P.2d 221 (3d Dist. 1940); People ex rel. Heydenreich v. Lyons, 374 Ill. 557, 30 N.E.2d 46, 132 A.L.R. 511 (1940); Ferch v. Housing Authority of Cass County, 79 N.D. 764, 59 N.W.2d 849 (1953).
A state constitutional provision barring the grant of special privileges and immunities is violated by a statute embodying an arbitrary classification. Power, Inc. v. Huntley, 39 Wash. 2d 191, 235 P.2d 173 (1951).

6 Thomas v. Housing and Redevelopment Authority of Duluth, 234 Minn. 221, 48 N.W.2d 175 (1951).

7 Brown v. Merlo, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212, 66 A.L.R.3d 505 (1973).

8 Acton v. Henderson, 150 Cal. App. 2d 1, 309 P.2d 481 (1st Dist. 1957).

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XIII. Equal Protection of the Laws; Class Legislation

B. Protection Against Special Burdens or Privileges

§ 915. Imposition of special burdens or liabilities as violating equal protection

Topic Summary | Correlation Table | References

West's Key Number Digest

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Legislation may impose special burdens upon defined classes in order to achieve permissible ends, consistent with the Equal Protection Clause.[1] In the exercise of the undoubted right of classification, it may often happen that some classes are subjected to regulations and some individuals are burdened with obligations which do not rest on other classes or other individuals not similarly situated, but this fact does not necessarily vitiate a statute, as it would practically defeat legislation if it were laid down as an invariable rule that a statute is void if it does not bring all within its scope or subject all to the same burdens.[2] It is of the essence of a classification that on one class are cast duties and burdens different from those resting on the general public and that the very idea of classification is that of inequality, so that the mere fact of inequality in no manner determines the matter of constitutionality.[3]

The general rule as to classification in the imposition of burdens is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition.[4] To put it another way, while many statutes impose classifications by declaring special burdens, and the Equal Protection Clause does not require all laws to apply uniformly to all people, equal protection does demand that laws treat alike all people who are similarly situated with respect to the legitimate purposes of the law.[5] If, under a particular classification, all persons affected by a statute are treated alike in the burdens imposed upon them, the legislation is not open to the objection that it denies to any the equal protection of the laws.[6] However, no burden can be imposed on one class of persons, natural or artificial, and arbitrarily selected, which is not in like conditions imposed on all other classes.[7]

A statute infringes the constitutional guarantee of equal protection if it singles out for discriminatory legislation particular individuals not forming an appropriate class[8] and imposes on them burdens or obligations or subjects them to rules from which others are exempt.[9] Under the guise of the exercise of the police power, it is not competent either for the legislature or for a municipality to impose unequal burdens upon individual citizens.[10]

It should be noted that special burdens are often necessary for general benefits, such as for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another; they are designed not to impose unequal or unnecessary restrictions upon anyone but to promote with as little individual inconvenience as possible the general good.[11]

Footnotes

1 Jensen v. Hernandez, 864 F. Supp. 2d 869 (E.D. Cal. 2012), clarified on denial of reconsideration, 2012 WL 2571272 (E.D. Cal. 2012) and aff'd, 572 Fed. Appx. 540 (9th Cir. 2014); Barletta v. Rilling, 973 F. Supp. 2d 132 (D. Conn. 2013).

2 Cotting v. Godard, 183 U.S. 79, 22 S. Ct. 30, 46 L. Ed. 92 (1901).

3 International Harvester Co. v. State of Missouri ex inf. Attorney General, 234 U.S. 199, 34 S. Ct. 859, 58 L. Ed. 1276 (1914); People v. Monroe, 349 Ill. 270, 182 N.E. 439, 85 A.L.R. 605 (1932); Bratberg v. Advance-Rumely Thresher Co., 61 N.D. 452, 238 N.W. 552, 78 A.L.R. 1338 (1931).

4 Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921); Marallis v. City of Chicago, 349 Ill. 422, 182 N.E. 394, 83 A.L.R. 1222 (1932).

5 Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

6 Staten Island Rapid Transit Ry. Co. v. Phoenix Indemnity Co., 281 U.S. 98, 50 S. Ct. 242, 74 L. Ed. 726 (1930); Kocsis v. Chicago Park Dist., 362 Ill. 24, 198 N.E. 847, 103 A.L.R. 141 (1935); Buckler v. Hilt, 209 Ind. 541, 200 N.E. 219, 103 A.L.R. 901 (1936); Commonwealth v. Watson, 223 Ky. 427, 3 S.W.2d 1077, 58 A.L.R. 212 (1928).

7 Atlantic Coast Line R. Co. v. Ivey, 148 Fla. 680, 5 So. 2d 244, 139 A.L.R. 973 (1941); Dimke v. Finke, 209 Minn. 29, 295 N.W. 75 (1940); State v. Northwestern Elec. Co., 183 Wash. 184, 49 P.2d 8, 101 A.L.R. 189 (1935).

8 §§ 845 to 912.

9 Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S. Ct. 525, 79 L. Ed. 1054 (1935).

10 Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 F.2d 846, 74 A.L.R. 1070 (C.C.A. 10th Cir. 1930); Beasley v. Cunningham, 171 Tenn. 334, 103 S.W.2d 18, 110 A.L.R. 306 (1937).

11 Mountain Timber Co. v. State of Washington, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97, 81 A.L.R.2d 1041 (1960).
A city ordinance requiring a railroad to install and maintain at its own expense several automatic signals at street crossings is not arbitrary, unreasonable, and in violation of the Equal Protection Clause where it is shown that the crossings in question are hazardous, that accidents at these crossings have resulted in considerable expense to the railroad, and that devices are necessary for public safety and convenience in light of the community's growth. Southern Ry. Co. v. City of Morristown, 448 F.2d 288 (6th Cir. 1971).
A state act imposing upon oil terminal operators, as licensees, absolute liability for oil spills instead of liability based on fault imposed on other shore facilities and vessels was not unconstitutionally discriminatory in violation of the Equal Protection Clause. Portland Pipe Line Corp. v. Environmental Imp. Com'n, 307 A.2d 1 (Me. 1973).

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XIII. Equal Protection of the Laws; Class Legislation

B. Protection Against Special Burdens or Privileges

§ 916. Grant of privileges as violating equal protection

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3000, 3006, 3035, 3036, 3039, 3041, 3043

Without violating the limitations inherent in the constitutional requirements as to the equal protection of the laws, appropriate classifications may be made. When made on natural and reasonable grounds, the grant of rights to one class will not necessarily amount to a denial of the equal protection of the laws to members of other classes.[1] In all cases, however, where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.[2] Under the Federal Constitution, distinctions in rights and privileges that are based on some reason not applicable to all are generally sustained.[3] The courts have rejected the contention that low-cost housing laws or ordinances are invalid as granting special privileges or immunities because they designated families or persons of low income as tenants.[4] However, if there are other general classes situated in all respects like the class benefited by a statute with the same inherent needs and qualities which indicate the necessity or expediency of protection for the favored class, and legislation discriminates against, casts a burden upon, or withholds the same protection from the other class or classes in like situations, the statute cannot stand.[5]

An otherwise valid statute or ordinance conferring a privilege is not rendered invalid merely because the particular persons on which the privilege is conferred find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend.[6]

Footnotes

1 Sanger v. City of Bridgeport, 124 Conn. 183, 198 A. 746, 116 A.L.R. 1031 (1938).

2 Champlin Refining Co. v. Cruse, 115 Colo. 329, 173 P.2d 213 (1946).

[3] Hampsmire v. City of Santa Cruz, 899 F. Supp. 2d 922 (N.D. Cal. 2012); Jung v. Association of American Medical Colleges, 339 F. Supp. 2d 26, 192 Ed. Law Rep. 789 (D.D.C. 2004), order aff'd, 184 Fed. Appx. 9 (D.C. Cir. 2006); Texas Parks and Wildlife Dept. v. Garland, 313 S.W.3d 920 (Tex. App. Tyler 2010); Weisfield v. City of Seattle, 180 Wash. 288, 40 P.2d 149, 96 A.L.R. 1190 (1935); Williams v. Hofmann, 66 Wis. 2d 145, 223 N.W.2d 844, 76 A.L.R.3d 880 (1974).
The Defense Appropriations Act provision granting an outsourcing preference for firms "under 51% Native American ownership" was rationally related to the legitimate legislative purpose of promotion of economic development of federally recognized Indian tribes and their members as required by equal protection. American Federation of Government Employees, AFL-CIO v. U.S., 330 F.3d 513 (D.C. Cir. 2003).

[4] Am. Jur. 2d, Housing Laws and Urban Redevelopment § 3.

[5] McErlain v. Taylor, 207 Ind. 240, 192 N.E. 260, 94 A.L.R. 1284 (1934); Abrams v. Bronstein, 33 N.Y.2d 488, 354 N.Y.S.2d 926, 310 N.E.2d 528 (1974); Kurtz v. City of Pittsburgh, 346 Pa. 362, 31 A.2d 257, 145 A.L.R. 1134 (1943).

[6] Gant v. Oklahoma City, 289 U.S. 98, 53 S. Ct. 530, 77 L. Ed. 1058 (1933).

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XIII. Equal Protection of the Laws; Class Legislation

C. Protection Against Special and Local Legislation

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XIII. Equal Protection of the Laws; Class Legislation

C. Protection Against Special and Local Legislation

§ 917. Protection against special and local legislation, generally

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In general, every special or private law which directly proposes to destroy or affect individual rights or does the same thing by restricting the privileges of certain classes of citizens and not of others when there is no public necessity for such discrimination is unconstitutional and void.[1]

A statute is "local" for purposes of a constitutional provision against local legislation if the class is so unnatural in formation that only by the rarest coincidence can it be viewed to include more than one locality, or at best but two or three, and these things are either apparent on the face of the statute or judicial notice may be taken of them.[2] That a statute is expressed in general terms is not and should not be decisive of the question of its validity under a state constitutional provision against special legislation.[3]

Footnotes

[1] Cotting v. Godard, 183 U.S. 79, 22 S. Ct. 30, 46 L. Ed. 92 (1901); Jones v. Chicago, R.I. & P. Ry. Co., 231 Ill. 302, 83 N.E. 215 (1907); City of Laurens v. Anderson, 75 S.C. 62, 55 S.E. 136 (1906).
A statute imposing a fee on the sale of cigarettes made by cigarette manufacturers who did not participate in a settlement between the state and some manufacturers did not violate the constitutional prohibition against special legislation; classifications between settling manufacturers, who paid annual fees that subsidized the costs to the state of smoking and acted to raise cigarette prices to discourage youthful smokers, and nonsettling manufacturers, who did not, created a genuine and substantial distinction tied to a legitimate state interest. Council of Independent Tobacco Mfrs. of America v. State, 685 N.W.2d 467 (Minn. Ct. App. 2004), aff'd, 713 N.W.2d 300 (Minn. 2006).
A statute which bars all actions based on or related to oral credit agreements is not special legislation and thus does not violate equal protection guarantees because the purpose of the statute is to protect depositors of financial institutions,

not merely the special interests of the financial institutions themselves. Nordstrom v. Wauconda Nat. Bank, 282 Ill. App. 3d 142, 218 Ill. Dec. 102, 668 N.E.2d 586 (2d Dist. 1996).

A statute governing de facto parentage did not violate a custodial parent's right to equal protection, where the complained of sections appeared only in the historical and statutory notes, not in the statute itself, and the statute was not special legislation affecting only the parent. C.M.G. v. L.M.S., 2009 WL 5697869 (Del. Fam. Ct. 2009).

[2] Stapleton v. Pinckney, 182 Misc. 590, 50 N.Y.S.2d 409 (Sup 1944), judgment aff'd, 293 N.Y. 330, 57 N.E.2d 38, 155 A.L.R. 783 (1944).

[3] Farrington v. Pinckney, 1 N.Y.2d 74, 150 N.Y.S.2d 585, 133 N.E.2d 817 (1956).

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XIII. Equal Protection of the Laws; Class Legislation

C. Protection Against Special and Local Legislation

§ 918. Effect of 14th Amendment on validity of special and local legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3037, 3043

The Equal Protection Clause of the 14th Amendment is not necessarily infringed by special legislation. It does not prohibit legislation which is limited either in the objects to which it is directed[1] or by the territory within which it is to operate.[2] It merely requires that all persons subjected to such special legislation shall be treated alike under like circumstances and conditions.[3] The Federal Constitution does not prohibit special laws inflexibly and always; it permits them when there are special evils with which existing general laws are incompetent to cope.[4]

Caution:

Although the precepts of equal protection may echo in the constitutional injunction against enactment of special laws, the doctrines exist independently of each other where the state constitution explicitly prohibits special laws; the prohibition against special laws is not just a mirror of equal protection notions but rather an absolute and unequivocal prohibition against applying statutory limitations to less than an entire class of like-situated litigants.[5] The common constitutional principle at the heart of an explicit special legislation proscription and the Equal Protection Clause is that like persons in like circumstances should be treated similarly by the sovereign.[6]

Footnotes

1 Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921); Central Lumber Co. v. State of South Dakota, 226 U.S. 157, 33 S. Ct. 66, 57 L. Ed. 164 (1912); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933); Buck v. Bell, 143 Va. 310, 130 S.E. 516, 51 A.L.R. 855 (1925), aff'd, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927).
The Equal Protection Clause was not violated by a statute permitting the Governor to exclude certain public employment positions from collective bargaining units, as the State had a legitimate interest in the efficiency of state government and a rational basis for treating some top-level managers differently from other managerial-type workers. American Federation of State, County, Municipal Employees (AFSCME), Council 31 v. State, Dept. of Cent. Management Services, 2015 IL App (1st) 133454, 393 Ill. Dec. 13, 33 N.E.3d 757 (App. Ct. 1st Dist. 2015).

2 § 900.

3 Ft. Smith Light & Traction Co. v. Board of Imp. of Paving Dist. No. 16 of City of Ft. Smith, Ark., 274 U.S. 387, 47 S. Ct. 595, 71 L. Ed. 1112 (1927); Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921); Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933); Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780, 52 A.L.R. 879 (1927); Buck v. Bell, 143 Va. 310, 130 S.E. 516, 51 A.L.R. 855 (1925), aff'd, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927).

4 Jones v. House of Reformation, 176 Md. 43, 3 A.2d 728 (1939).

5 Beason v. I. E. Miller Services, Inc., 2019 OK 28, 441 P.3d 1107 (Okla. 2019).

6 Marcellus Shale Coalition v. Department of Environmental Protection, 216 A.3d 448 (Pa. Commw. Ct. 2019), appeal quashed, 223 A.3d 655 (Pa. 2019) and appeal quashed, 223 A.3d 655 (Pa. 2019).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450 to 3467, 3816, 3817

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16B Am. Jur. 2d Constitutional Law § 919

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 919. Equal protection and legal proceedings, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450 to 3467

While all citizens have a constitutional right to access to courts, that right in and of itself is not a fundamental right for purposes of an equal protection analysis.[1] Nevertheless, equal protection demands that access to judicial proceeding cannot be granted to some litigants and capriciously or arbitrarily denied to other.[2] Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the 14th Amendment, when its courts are open to them on the same conditions as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.[3] Equal protection of the law implies that all litigants similarly situated may appeal to the courts for both relief and defense under like conditions, with like protection, and without discrimination.[4] Thus, depriving a nonresident of the right to sue and defend in the courts of a state upon the same terms of equality with residents of the state in respect of the measure of damages enforced in similar causes of action and like circumstances is a denial of equal protection.[5] Also, any general policy favoring an initial complainant over a later complainant without giving primary regard to the particular facts involved violates equal protection.[6] However, it is not a denial of equal protection to deny a forum to a plaintiff who is unable to articulate a cause of action.[7]

The 14th Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation.[8] The equal protection of the laws guaranteed by this amendment in respect of legal proceedings does not require that every person in the land shall possess the same rights and privileges as every other person and hence does not forbid proper and reasonable classifications in the field of court proceedings.[9] This amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.[10]

By federal statute, all persons within the jurisdiction of the United States have the same right in every state and territory to

sue, be parties, and give evidence.[11] This statute also applies to aliens.[12]

Footnotes

1 Hughes v. Tennessee Board of Probation and Parole, 514 S.W.3d 707 (Tenn. 2017).

2 Brown v. District of Columbia, 115 F. Supp. 3d 56 (D.D.C. 2015).

3 Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921); Marallis v. City of Chicago, 349 Ill. 422, 182 N.E. 394, 83 A.L.R. 1222 (1932); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 184 N.E. 152, 87 A.L.R. 1407 (1933); State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S.W.2d 124 (1930) (overruled in part on other grounds by, City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W.2d 372 (1949)).
As to procedure, generally, see § 922.
As to equal protection of the laws in criminal proceedings, generally, see Am. Jur. 2d, Criminal Law §§ 888 to 894.

4 Sexton v. Barry, 233 F.2d 220, 1 Ohio Op. 2d 231, 75 Ohio L. Abs. 71 (6th Cir. 1956); Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228 (C.C.A. 8th Cir. 1945), judgment aff'd, 327 U.S. 757, 66 S. Ct. 523, 90 L. Ed. 991 (1946).

5 State, for Use of Strepay v. Cohen, 166 Md. 682, 172 A. 274, 94 A.L.R. 427 (1934); State ex rel. Cronkhite v. Belden, 193 Wis. 145, 214 N.W. 460, 57 A.L.R. 1218 (1927).
As to discrimination against nonresidents, generally, see § 894.

6 Myers v. County of Orange, 157 F.3d 66 (2d Cir. 1998).

7 Beren v. Ropfogel, 24 F.3d 1226 (10th Cir. 1994).

8 Missouri Pac. R. Co. v. Larabee, 234 U.S. 459, 34 S. Ct. 979, 58 L. Ed. 1398 (1914).

9 State of Missouri v. Lewis, 101 U.S. 22, 25 L. Ed. 989, 1879 WL 16647 (1879).
A statute providing a cause of action for a tenant of premises unfit for habitation, which was restricted to tenants paying no more than a specified amount per week, was a reasonable and constitutional restriction. Moore v. Fowinkle, 512 F.2d 629 (6th Cir. 1975).

10 Reetz v. People of State of Michigan, 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563 (1903); Sawyer v. State, 94 Fla. 60, 113 So. 736 (1927).

11 42 U.S.C.A. § 1981.

12 Am. Jur. 2d, Aliens and Citizens § 2086.

16B Am. Jur. 2d Constitutional Law § 920

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 920. Jurisdiction and venue laws as violating equal protection in legal proceedings

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West's Key Number Digest

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Civil actions removable from state court to federal court under 28 U.S.C.A. s 1443, 159 A.L.R. Fed. 377

A federal statute[1] barring the jurisdiction of the Court of Federal Claims over the claim of plaintiff who has an action pending in any other court for or in respect to same claim does not violate the Equal Protection Clause of the Fifth Amendment, by granting a waiver of sovereign immunity for suits against United States by some plaintiffs but not others, since the statute is rationally related to the government's legitimate interest in saving the government from the burdens of redundant litigation and preventing plaintiffs from using the filing of a suit in district court as tactical device to divest the Court of Federal Claims of jurisdiction in order to produce dismissal of the lawsuit without prejudice.[2] The Equal Protection Clause of the 14th Amendment is not violated by any diversity in the jurisdiction of the several courts of a state as to subject matter, amount, or finality of decision, if all persons within the territorial limits of the respective jurisdictions of such courts have an equal right, in like cases and under like circumstances, to resort to them for redress.[3] Each state has the right to make political subdivisions of its territory for municipal purposes and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right.[4]

The legislature has discretion to fix the venue of civil actions as long as it does not transgress fundamental guarantees of equal protection of the laws and does not arbitrarily and unreasonably discriminate against particular persons.[5]

Since it is fundamental rights which the 14th Amendment safeguards and not the mere forum which a state may deem proper to designate for the enforcement and protection of such rights, given a condition where fundamental rights are equally protected and preserved, rights which are thus protected and preserved are not denied because the state has deemed it best to provide for a trial in one forum or another; it is not the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.[6]

Footnotes

1 28 U.S.C.A. § 1500.

2 Petro-Hunt, L.L.C. v. U.S., 105 Fed. Cl. 37 (2012), aff'd, 862 F.3d 1370 (Fed. Cir. 2017), cert. denied, 138 S. Ct. 1989, 201 L. Ed. 2d 249 (2018).

3 State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930); Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).
A state may establish such courts as it deems fit and prescribe their respective jurisdictions, and the equal protection of the laws is not violated by such diversity in jurisdiction. Roe v. Roe, 65 Misc. 2d 335, 316 N.Y.S.2d 94 (Fam. Ct. 1970).

4 Russell Petroleum Co. v. Walker, 1933 OK 75, 162 Okla. 216, 19 P.2d 582 (1933).

5 Burlington Northern R. Co. v. Ford, 504 U.S. 648, 112 S. Ct. 2184, 119 L. Ed. 2d 432 (1992) (venue rules permitting a plaintiff to sue a corporation incorporated in that state only in the county of its principal place of business but permitting a suit in any county against a corporation incorporated elsewhere do not offend the Equal Protection Clause since the rules further a legitimate state interest in the adjustment of disparate interests of parties to lawsuit in the place of trial).
The rational basis test applied in an equal protection challenge to a statute providing specific venues for tort suits brought against nonresident corporations; limiting venue did not affect access to courts but rather merely specified the appropriate venues available. Davis v. Union Pacific R. Co., 282 Mont. 233, 937 P.2d 27 (1997).
As to venue of actions against corporations, generally, see Am. Jur. 2d, Venue § 40.

6 American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 96 S. Ct. 1800, 48 L. Ed. 2d 263 (1976).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 921. Conditions precedent to suit as violating equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450 to 3467

The 14th Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction is real and the condition imposed has a reasonable relation to a legitimate object.[1] Reasonable classifications as to the residence prerequisite to the maintenance of certain types of litigation do not violate the Constitution.[2] Where a right of action did not exist at common law but is statutory in origin, the right may be granted upon such conditions as the legislature, in its wisdom, sees fit to impose.[3]

Notice statutes making the right to sue the government conditional on giving notice of the claim do not deny equal protection because this requirement is a reasonable restriction that applies equally to all persons wishing to sue the government.[4]

Footnotes

1 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); Jones v. Union Guano Co., 264 U.S. 171, 44 S. Ct. 280, 68 L. Ed. 623 (1924); State v. Sanks, 225 Ga. 88, 166 S.E.2d 19 (1969); Brown v. Board of Trustees of Town of Hamptonburg, School Dist. No. 4, 303 N.Y. 484, 104 N.E.2d 866, 34 A.L.R.2d 720 (1952).

2 Worthington v. District Court of Second Judicial Dist. in and for Washoe County, 37 Nev. 212, 142 P. 230 (1914).

3 Brown v. Board of Trustees of Town of Hamptonburg, School Dist. No. 4, 303 N.Y. 484, 104 N.E.2d 866, 34 A.L.R.2d 720 (1952).

[4] Nash v. Blatchford, 56 Kan. App. 2d 592, 435 P.3d 562 (2019), review denied, (Sept. 9, 2019).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 922. Procedural rules as violating equal protection in legal proceedings, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450 to 3467

It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions.[1] Furthermore, the Equal Protection Clause does not exact uniformity of procedure; the legislature may classify litigation and adopt one type of procedure for one class and a different type for another,[2] so long as the classification meets the test of reasonableness.[3] Incidental individual inequality resulting from the operation of a rule of court does not make it offensive to the 14th Amendment.[4] The legislature may prescribe novel and unprecedented methods of procedure, provided that they afford the parties affected substantial security against arbitrary and unjust spoliation. For example, the Equal Protection Clause is not violated by proposed legislation mandating a stay of a civil tort action brought by a defendant in a sexual assault case against a victim pending resolution of the criminal action where the bill would otherwise allow the action to proceed if the delay would be prejudicial.[5] A state statute classifying some tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective or if the objective itself is beyond the state's power to achieve.[6]

Footnotes

1 Salas v. Clements, 57 Mich. App. 367, 226 N.W.2d 101 (1975), judgment rev'd on other grounds, 399 Mich. 103, 247 N.W.2d 889 (1976).

2 Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930); Sellers v. Home Furnishing Co.,

Inc., 235 Ga. 831, 222 S.E.2d 34 (1976); Helfrick v. Dahlstrom Metallic Door Co., 256 N.Y. 199, 176 N.E. 141 (1931), judgment aff'd, 284 U.S. 594, 52 S. Ct. 202, 76 L. Ed. 511 (1932).

A state can constitutionally afford a different procedure in investigations relating to professional misconduct of attorneys from that in criminal prosecutions. Cohen v. Hurley, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961) (overruled in part on other grounds by, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)) and (overruled in part on other grounds by, Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967)).

A statute pursuant to which certain judicial actions taken in cases in which the state is a party are void unless, among other things, the state attorney general is given a specified number of days' written notice of the hearing or trial resulting in judicial action does not violate equal protection by granting a benefit to state litigants not provided to other litigants. Georgia Dept. of Medical Assistance v. Columbia Convalescent Center, 265 Ga. 638, 458 S.E.2d 635 (1995).

[3] Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).

Moratorium laws affecting procedures in mortgage foreclosure cases have been upheld against attack under the Equal Protection Clause. U.S. Mortg. Co. v. Matthews, 293 U.S. 232, 55 S. Ct. 168, 79 L. Ed. 299 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934).

Requiring dismissal of all out-of-state asbestos-related claims filed within a specified period preceding the effective date of a new forum non conveniens statute, rather than applying the new law to those claims retroactively, was rationally related to a legitimate state interest, and thus, the statute did not violate equal protection, even though some nonresident plaintiffs and state residents who refiled in the state would lose their filing fees, previous discovery, and places in line, where the legislature believed state residents were being denied access to state courts because of a backlog of such cases due to forum-shopping by nonresidents. Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999).

[4] Martin v. Walton, 368 U.S. 25, 82 S. Ct. 1, 7 L. Ed. 2d 5 (1961).

[5] Opinion of the Justices, 137 N.H. 260, 628 A.2d 1069 (1993).

[6] Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 923. Statutes of limitations as violating equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3454

As a general rule, the Equal Protection Clause is not offended by statutes that assign differing time periods within which various causes of action may be brought or that assign differing time periods depending on the legal nature of the defendants involved,[1] unless the time periods are unreasonable or discriminatory.[2]

The Equal Protection Clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within a specified number of years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments only if a plaintiff cannot revive his or her judgment in the state where it was originally obtained, and the relevant date in applying the statute is not the date of the original judgment, but rather the date of the latest revival of the judgment.[3] A statute requiring tort claims against the state to be filed within a specified number of days does not establish a suspect classification, does not discriminate against one class, and does not infringe upon any fundamental right.[4]

Observation:

The rational basis standard, or reasonable basis test, is applied to equal protection challenges to laws which result in a shorter statute of limitations or a shorter notice of claim period for a certain nonsuspect class of citizens, including plaintiffs in particular types of cases.[5]

Footnotes

[1] Fields v. Legacy Health System, 413 F.3d 943 (9th Cir. 2005) (Oregon's limitations period for wrongful death claims and repose period for medical malpractice claims); Buszka v. Iowa City Community School District, 898 N.W.2d 202 (Iowa Ct. App. 2017) (statute of limitation for damages claims against any municipality or officer, employee, or agent of municipality for or on account of loss or injury).
It is within the power and competency of the legislature to provide for different periods of limitation for different actions where the classification is not unreasonable or discriminatory. Stephens v. Snyder Clinic Ass'n, 230 Kan. 115, 631 P.2d 222 (1981).
A statute of repose governing medical malpractice actions did not violate equal protection by treating medical malpractice claims differently than other professional malpractice claims but was a rational exercise of legislative power. Nichols v. Gross, 282 Ga. 811, 653 S.E.2d 747 (2007).
A statute of repose for negligence actions against architects and engineers did not violate the equal protection guarantees of either the Texas or United States Constitution; the different treatment for architects and engineers, as opposed to owners or materialmen, was rationally related to the parties' differing circumstances. Trinity River Authority v. URS Consultants, Incorporated-Texas, 889 S.W.2d 259 (Tex. 1994).
As to the reasonableness of limitation periods, generally, see Am. Jur. 2d, Limitation of Actions §§ 33 to 35.

[2] Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977) (overruled on other grounds by, Miller v. Boone County Hosp., 394 N.W.2d 776 (Iowa 1986)); Jenkins v. State, 85 Wash. 2d 883, 540 P.2d 1363 (1975); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975).
A statute whose purpose was to allow survival of pending tort actions violated the Equal Protection Clause in that the classification, which allowed litigants living in counties with two superior court terms annually more time in which to file than those litigants living in counties with three terms each year, was not reasonably related to the statutory purpose. Belkner v. Preston, 115 N.H. 15, 332 A.2d 168 (1975).
A requirement that a victim of a governmental tort give notice to a municipality within a specified number of days after the cause of action accrues as to his or her intention to sue on the claim constitutes invidious discrimination which is impermissible under the constitutional guarantee of equal protection. O'Neil v. City of Parkersburg, 160 W. Va. 694, 237 S.E.2d 504 (1977).

[3] Watkins v. Conway, 385 U.S. 188, 87 S. Ct. 357, 17 L. Ed. 2d 286 (1966).

[4] Newlan v. State, 96 Idaho 711, 535 P.2d 1348 (1975).

[5] Buszka v. Iowa City Community School District, 898 N.W.2d 202 (Iowa Ct. App. 2017); Injured Workers of Kansas v. Franklin, 262 Kan. 840, 942 P.2d 591 (1997); Ambers-Phillips v. SSM DePaul Health Center, 459 S.W.3d 901 (Mo. 2015); Estate of McCarthy v. Montana Second Judicial Dist. Court, Silverbow County, 1999 MT 309, 297 Mont. 212, 994 P.2d 1090 (1999) (minors); Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849 (2000) (minors).
Minimum scrutiny, not strict scrutiny, applied to an equal protection challenge regarding a statute barring claims against the North Carolina Insurance Guaranty Association (NCIGA) filed after the final date set by the court for filing claims against the liquidator or receiver of an insolvent insurer and a statute of repose requiring covered claims against the NCIGA to be brought within five years after the date of entry of the court order finding an insurer to be insolvent, where the challenged provisions did not affect a fundamental right or suspect class. Booth v. Hackney Acquisition Company, 256 N.C. App. 181, 807 S.E.2d 658 (2017), appeal dismissed, 370 N.C. 696, 811 S.E.2d 594 (2018).
As to the rational basis test, generally, see §§ 850 to 852.

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 924. Rules regarding process as violating equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3456

A statute providing for a different method of service of process on ordinary domestic corporations as against specially chartered corporations is not an unlawful discrimination in violation of the Equal Protection Clause.[1] A statute tolling the limitation period for an action against a foreign corporation that is not represented in the state by any person or officer on whom process may be served does not violate equal protection, notwithstanding the enactment of a long-arm statute, especially as the institution of long-arm jurisdiction has not made service on an unrepresented foreign corporation the equivalent of service on a corporation with an in-state representative.[2] Statutes providing for service upon the Secretary of State in actions against nonresidents engaged in business or a business venture within the state have been held not to violate the Equal Protection Clause.[3]

A state rule of civil procedure which requires that a person served with process outside the state must be served with a copy of the complaint and a copy of the summons, while only requiring a copy of the summons to be served upon those served within the state, is not a denial of equal protection of the laws.[4] A statute providing for service of process in summary eviction proceedings on natural persons to be accomplished in one of three ways—namely, personal service, substituted service, or conspicuous service—with a further proviso that if either the substituted or conspicuous methods of service are used, a copy of the notice and petition must be mailed to the person within one day after delivery or affixing, is not in violation of the Equal Protection Clause.[5] Residents and nonresidents of a state may be placed into distinct classes for the purpose of the process of attachment.[6]

Observation:

A plaintiff who sought the State Marshals' services in serving process and disposing of abandoned property failed to show that he was similarly situated to other individuals for whom the Marshals performed services, as required to establish plaintiff's class-of-one equal protection claim based on the Marshals Service's refusal to perform plaintiff's requested services, where a dispute existed as to the lawfulness of plaintiff's requests.[7]

Footnotes

1 State v. Tedder, 103 Fla. 1083, 138 So. 643 (1932) (service by publication).

2 G. D. Searle & Co. v. Cohn, 455 U.S. 404, 102 S. Ct. 1137, 71 L. Ed. 2d 250 (1982).

3 State ex rel. Weber v. Register, 67 So. 2d 619 (Fla. 1953).
As to so-called "long-arm statutes" which permit service of process on nonresidents doing business or other acts in the state, generally, see Am. Jur. 2d, Process §§ 147 to 157.

4 Owens v. I. F. P. Corp., 374 F. Supp. 1032 (W.D. Ky. 1974), judgment aff'd, 419 U.S. 807, 95 S. Ct. 23, 42 L. Ed. 2d 36 (1974).

5 Velazquez v. Thompson, 451 F.2d 202 (2d Cir. 1971).

6 National General Corp. v. Dutch Inns of America, Inc., 15 Cal. App. 3d 490, 93 Cal. Rptr. 343 (2d Dist. 1971).

7 Morneau v. Connecticut, 605 F. Supp. 2d 372 (D. Conn. 2009).

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16B Am. Jur. 2d Constitutional Law § 925

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 925. Evidentiary rules as violating equal protection in legal proceedings; statutory presumptions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3463

A legislature may, without violating the Equal Protection Clause, make applicable to a particular proceeding a rule of evidence which is inapplicable to other proceedings as long as the legislation meets the test of reasonableness.[1] Thus, a state's rape shield statute does not violate the Equal Protection Clause by distinguishing between rape defendants and other criminal defendants in the admission of evidence.[2] Generally, it is competent for a legislative body to provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts.[3] In order that a legislative presumption of one fact from evidence of another may not constitute a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.[4] The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of the legislature to amass the stuff of actual experience and cull conclusions from it.[5] Statutes creating a presumption of fraud under certain circumstances are generally upheld if the inference is not merely arbitrary and there is a rational relationship between the facts of which the proof of one is made prima facie evidence of the other.[6]

On the other hand, the Equal Protection Clause is violated by a state's statutory procedure whereby an unwed father is presumed to be unfit to raise his illegitimate children upon their mother's death, and may be deprived of the custody of his children, without a hearing as to his fitness, by the state's institution of dependency proceedings to declare the children wards of the state and to place them in guardianship, whereas a hearing is extended to all other parents whose custody of their children is challenged.[7] Also, a statutory presumption that the mere possession of a firearm by an unnaturalized foreign-born person was for an unlawful purpose denies the defendant equal protection.[8]

In determining the constitutionality of a statutory presumption of dependency, the question is not whether the presumption is required, but whether it is permitted, and the court's role is not to hypothesize independently on the desirability or feasibility of any possible alternative basis for the presumption.[9]

Footnotes

1 Commissioner of Public Welfare of City of New York, on Complaint of Vincent v. Koehler, 284 N.Y. 260, 30 N.E.2d 587 (1940).
Equal protection was not violated by a statute that permitted a plaintiff injured in an automobile accident to introduce proof of negligence but denied the defendant an opportunity to prove that the plaintiff was negligent in not wearing her seat belt; the classification prohibiting anyone from offering, as evidence of negligence, the fact that a party failed to wear a seat belt was reasonable, was related to a legitimate state interest, and treated all similarly situated persons equally. C.W. Matthews Contracting Co., Inc. v. Gover, 263 Ga. 108, 428 S.E.2d 796 (1993).
A statute which allowed evidence of collateral source benefits where a claimant demanded judgment for damages in excess of a specified amount violated equal protection; even assuming that the statute's objective was to cut insurance costs and that this was a legitimate objective, the classification did not reasonably further that purpose. Thompson v. KFB Ins. Co., 252 Kan. 1010, 850 P.2d 773 (1993).

2 Jones v. Goodwin, 982 F.2d 464 (11th Cir. 1993).

3 Am. Jur. 2d, Evidence § 7.

4 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976) (upholding an irrebuttable presumption of total disability from complicated pneumoconiosis under the Federal Coal Mine Health and Safety Act).
A statute creating a conclusive presumption that no par stock of a corporation shall have a value of a specified amount per share for purposes of a franchise tax did not violate the Equal Protection Clause. Gulf Oil Corp. v. Heath, 255 Ark. 604, 501 S.W.2d 787 (1973).

5 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976).

6 Am. Jur. 2d, Fraud and Deceit § 19.

7 Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

8 Sandiford v. Commonwealth, 217 Va. 117, 225 S.E.2d 409 (1976).

9 Mathews v. Lucas, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976).
The conclusive presumption of total dependency afforded to widows by a state workers' compensation statute violates equal protection, where it is unsupported by any clear indication of ameliorative purpose to remove the effects of past sex discrimination; pending action by the state legislature, all applicants would have to establish proof of dependency. Arp v. Workers' Comp. Appeals Bd., 19 Cal. 3d 395, 138 Cal. Rptr. 293, 563 P.2d 849 (1977).

16B Am. Jur. 2d Constitutional Law § 926

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 926. Remedies and defenses as violating equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450, 3459

The fact that litigants are required to follow the remedies provided by law does not amount to a denial of equal protection of the laws.[1] Neither is equal protection necessarily denied by a statutory classification affecting remedies.[2] Thus, no constitutional defect inheres in a classification of remedies which provides a uniform, although special and summary, proceeding for a quick determination of questions, and that is based upon a natural and reasonable distinction between cases requiring a prompt hearing and a particular form of judgment and ordinary cases at law or in equity.[3]

The 14th Amendment to the Federal Constitution does not force the state to accept particular modern doctrines of equity, to adopt a combined system of law and equity procedure, to dispense with all necessity for form and method in pleading, or to give untrammeled liberty to make amendments.[4] The legislative discretion to grant or withhold equitable relief in any class of cases must, however, under the equal protection of the laws clause, be so exercised as not to grant equitable relief to one and to deny it to others under like circumstances and in the same territorial jurisdiction.[5]

If conduct against which a statute forbids injunctions is in and of itself lawful and authorized by statute, there is no denial of the equal protection of the laws in such statute forbidding injunctions because no one has in the first instance a constitutional right to a "remedy" against conduct of another person which is lawful.[6]

A state survival statute providing for the survival of all actions beyond the death of the injured party except for libel or slander actions creates an arbitrary distinction serving no function of a survival statute or of the law of defamation and is unconstitutional.[7] However, as applied where both parties are alive when a suit is brought but one party dies while it is pending, a state's survival statute's prohibition against the survival of slander and libel claims is rationally related to a legitimate government interest and thus not violative of equal protection.[8]

Statutes providing for different remedies with respect to the garnishment of wages of state employees as compared with other employees,[9] or of persons who incur debts for the common necessaries of life as compared with those who incur other types of debts,[10] and statutes providing distinctions between the attachment of property belonging to residents as compared with nonresidents[11] do not constitute a denial of equal protection.

Legislation affecting defenses has frequently been sustained as against attack under the Equal Protection Clause.[12]

Footnotes

1 Swain v. Pressley, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977).
Persons injured by the negligence of employees or agents of the state are not denied equal protection simply because they are confined for redress to the state court of claims, where the injured party does not have a right to jury trial, or a right to appeal, and where any recovery is limited to a specified amount, since the separate procedure is a statutory condition on the abolition of sovereign immunity. Seifert v. Standard Paving Co., 64 Ill. 2d 109, 355 N.E.2d 537 (1976) (overruled on other grounds by, Rossetti Contracting Co., Inc. v. Court of Claims, 109 Ill. 2d 72, 92 Ill. Dec. 521, 485 N.E.2d 332 (1985)).
Equal protection is not denied to prisoners who have been certified to the state hospital as mentally ill by the judicial requirement that they, unlike other prisoners, cannot seek relief by coram nobis or like procedure until there has been a preliminary determination or their competency to participate in such legal proceedings. People v. Aponte, 28 N.Y.2d 343, 321 N.Y.S.2d 871, 270 N.E.2d 700 (1971).

2 Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39 (N.D. 1974).
Limitation of recovery under an unsatisfied claim and judgment fund law to domiciliaries of the state was constitutional under the Equal Protection Clause since the statute imposed no durational residential requirement inhibiting fundamental rights, such as the right to migrate from state to state, it applied equally to all persons within the boundaries of the state, and, as being intended to protect the state's citizens and being funded by monies collected from within the state, it bore a rational relationship to a legitimate state purpose. Holly v. Maryland Auto. Ins. Fund, 29 Md. App. 498, 349 A.2d 670 (1975).

3 Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); Telegraph Ave. Corp. v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A.L.R. 366 (1928).

4 Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921).

5 Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375 (1921).

6 Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937); Fenske Bros. v. Upholsterers' International Union of North America, Local No. 18, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318 (1934); Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910, 116 A.L.R. 477 (1937).

7 Moyer v. Phillips, 462 Pa. 395, 341 A.2d 441, 75 A.L.R.3d 741, 77 A.L.R.3d 1339 (1975).

8 Innes v. Howell Corp., 76 F.3d 702, 1996 FED App. 0050P (6th Cir. 1996).

9 Katz v. Ke Nam Kim, 379 F. Supp. 65 (D. Haw. 1974).

10 Thayer v. Madigan, 52 Cal. App. 3d 16, 125 Cal. Rptr. 28 (1st Dist. 1975).

11 McGoldrick v. ICS Sales & Leasing, Inc., 412 F. Supp. 268 (E.D. N.Y. 1976); Property Research Financial Corp. v. Superior Court, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (2d Dist. 1972).

12 Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); Hawkins v. Bleakly, 243 U.S. 210, 37 S. Ct. 255, 61 L. Ed. 678 (1917); Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N.W. 1037 (1915), opinion amended on other grounds on denial of reh'g, 175 Iowa 245, 157 N.W. 145 (1916).
A state statute which prohibits introduction of evidence by the defense in a wrongful death action that a surviving spouse is involved in a common-law marriage, while allowing evidence of actual ceremonial remarriage, does not violate the Equal Protection Clause. Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927, 1 Fed. R. Evid.

Serv. 193 (5th Cir. 1976), on reh'g on other grounds, 540 F.2d 837, 1 Fed. R. Evid. Serv. 193 (5th Cir. 1976).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 927. Judicial decisions and rulings as equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450, 3465

The rule is well settled that the Equal Protection Clause does not assure uniformity of judicial decisions[1] or immunity from judicial error.[2] Thus, the fact that a court departs from the precedent established by its earlier decisions does not deprive the complaining party of equal protection.[3] From what has been said it follows a fortiori that the 14th Amendment does not require uniformity in the decisions of the courts of different states.[4]

The fact that one loses his or her case does not show a denial of equal protection of the laws.[5] It is not an equal protection violation for a state court to dismiss the federal civil rights claim of a dilatory litigant.[6]

Requiring an affirmative vote of a majority of circuit judges in regular active service as a prerequisite to granting a rehearing en banc, even though most judges have recused themselves, does not violate the Equal Protection Clause.[7]

Footnotes

1 Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962); Milwaukee Electric Ry. & Light Co. v. State of Wisconsin ex rel. City of Milwaukee, 252 U.S. 100, 40 S. Ct. 306, 64 L. Ed. 476, 10 A.L.R. 892 (1920); Davis v. Behagen, 321 F. Supp. 1216 (S.D. N.Y. 1970), order aff'd, 436 F.2d 596 (2d Cir. 1970).

2 Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962); Seaboard Air Line Ry. Co. v. Watson, 287 U.S. 86, 53 S. Ct. 32, 77 L. Ed. 180, 86 A.L.R. 174 (1932); Brosten v. Scheeler, 360 F. Supp. 608 (N.D. Ill. 1973), aff'd, 495 F.2d 1375 (7th Cir. 1974).

[3] Fidelity & Columbia Trust Co. v. City of Louisville, 245 U.S. 54, 38 S. Ct. 40, 62 L. Ed. 145 (1917); Lombard v. West Chicago Park Com'rs, 181 U.S. 33, 21 S. Ct. 507, 45 L. Ed. 731 (1901).

[4] Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937).

[5] Sexton v. Barry, 233 F.2d 220, 1 Ohio Op. 2d 231, 75 Ohio L. Abs. 71 (6th Cir. 1956).

[6] DeVargas v. Montoya, 796 F.2d 1245 (10th Cir. 1986) (overruled on other grounds by, Newcomb v. Ingle, 827 F.2d 675 (10th Cir. 1987)).

[7] U.S. v. Nixon, 827 F.2d 1019 (5th Cir. 1987).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

1. In General

§ 928. Rules as to damages and costs as violating equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3450, 3467

A statute providing for recovery of special damages only for libel in newspapers or slander by radio unless a correction is requested and refused is not violative of equal protection in granting to newspapers and radio stations privileges denied to others.[1] Statutes limiting the amount of damages recoverable in wrongful death actions have also been sustained,[2] as have statutes subjecting a certain class of claimants to such limits.[3] Thus, the Equal Protection Clause is not violated by state statutes which deny punitive damages in wrongful death cases but allow such damages in other personal injury actions.[4] However, a statutory cap on noneconomic damages in common-law actions for death, bodily injury, and property damage violates the special legislation clause of a state constitution as arbitrary and not rationally related to the legitimate government interest in reducing systemic costs of tort liability.[5]

The equal protection guarantees of the 14th Amendment are violated by a state statute which requires cost bonds from litigants against the state, but not from litigants against private parties.[6]

Footnotes

1 Werner v. Southern Cal. Associated Newspapers, 35 Cal. 2d 121, 216 P.2d 825, 13 A.L.R.2d 252 (1950).

2 Am. Jur. 2d, Death § 179.

3 Czapinski v. St. Francis Hosp., Inc., 2000 WI 80, 236 Wis. 2d 316, 613 N.W.2d 120 (2000) (holding that classifications created by a statute which makes wrongful death actions against health care providers and their

employees subject to damage limits generally applicable to wrongful death actions but does not expand the class of claimants entitled to recover for loss of society and companionship due to the wrongful death of a patient caused by medical malpractice to include adult children of the patient, are supported by a rational basis, and do not violate the Equal Protection Clause of the state constitution).

[4] In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594 (7th Cir. 1981); Ford Motor Co. v. Superior Court, 120 Cal. App. 3d 748, 175 Cal. Rptr. 39 (1st Dist. 1981).

[5] Best v. Taylor Mach. Works, 179 Ill. 2d 367, 228 Ill. Dec. 636, 689 N.E.2d 1057 (1997) (noting that the analysis followed in a challenge brought under the special legislation provision of the state constitution is generally the same as that followed in an equal protection challenge).

[6] Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

2. Appeals

§ 929. Rules as to taking of appeals as violating equal protection in legal proceedings, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3466

It is part of the general rule relating to the application of the Equal Protection Clause of the 14th Amendment to legislation which classifies in fixing the jurisdiction of courts that among the matters in which diversity may validly be effected is diversity respecting the finality of decision.[1] Thus, the equal protection of the laws is not denied by a state statute which establishes a separate appellate court for certain counties, with exclusive final appellate jurisdiction in certain cases which, if arising in the courts of other counties, would be appealable to the highest state court.[2] Moreover, the Equal Protection Clause does not require an appeal in a particular type of proceeding or in some particular situation if all persons within a class are treated alike, although an appeal may be allowed to persons differently situated.[3] Reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals will not be questioned under the Equal Protection Clause if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied.[4] A state law is not capricious or arbitrary, so as to violate the Equal Protection Clause, in requiring payment of a specified appellate court filing fee, without regard to the ability to pay, except in allowing in forma pauperis criminal appeals, habeas corpus petitions from state institutions or civil commitment proceedings, and appeals from terminations of parental rights.[5]

The Federal Constitution does not require a state to adopt a unifying method of appeals which will ensure to all litigants within the state the same decisions on particular questions which may arise.[6]

Although a state is not constitutionally required to provide a system of appellate review,[7] once an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.[8] The grant of a right of appeal to one litigant with an accompanying failure to make the same grant to the other is discriminatory and is a violation of both the Federal and State Constitutions.[9] Thus, a state statute requiring tenants appealing evictions to post a bond in an amount twice the rental value of the premises is unconstitutional as violative of equal protection, where other appellants in the state are not subjected to such a double-bond requirement.[10] On the other hand,

requirements contained in a state statute, for the giving of a bond in an amount double that of the judgment rendered against a tenant for damages for unlawful detainer and in an amount sufficient to cover one year's rent, have been held to bear a reasonable relation to the amount that may be subject to be recovered under the bond if the landlord prevails on appeal and thus not to constitute a denial of equal protection.[11] Similarly, the imposition of a $5,000 appeal bond when a settlement objector pursues a merits appeal does not deprive the objector of equal protection, as the amount is not so burdensome as to deprive the objector of his or her rights, where the $5,000 involves costs to be paid only if the objector's appeal is unsuccessful.[12]

Footnotes

1 § 920.

2 State of Missouri v. Lewis, 101 U.S. 22, 25 L. Ed. 989, 1879 WL 16647 (1879).

3 Com. v. J & R Equipment Rental Co., Inc., 28 Pa. Commw. 558, 368 A.2d 1389 (1977), order aff'd, 477 Pa. 442, 384 A.2d 240 (1978).

4 Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); Board of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs, 363 Mass. 339, 294 N.E.2d 393 (1973).

5 Ortwein v. Schwab, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973).

6 State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930).

7 In re Brown, 8 V.I. 313, 439 F.2d 47 (3d Cir. 1971); Javits v. Stevens, 382 F. Supp. 131 (S.D. N.Y. 1974); Boshears v. Arkansas Racing Commission, 258 Ark. 741, 528 S.W.2d 646 (1975).

8 Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); In re Brown, 8 V.I. 313, 439 F.2d 47 (3d Cir. 1971); Javits v. Stevens, 382 F. Supp. 131 (S.D. N.Y. 1974).
A state may not be constitutionally obligated to create appellate remedies, but having done so it may not arbitrarily deny them to a particular class of litigants. Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554 (7th Cir. 1986).

9 Du Pont v. Family Court for New Castle County, 52 Del. 72, 153 A.2d 189 (1959); Maynard v. B. F. Goodrich Co., 144 Ohio St. 22, 28 Ohio Op. 558, 56 N.E.2d 195 (1944).

10 Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); Harrington v. Harrington, 269 A.2d 310 (Me. 1970); Dixon v. Davis, 521 S.W.2d 442 (Mo. 1975).

11 State ex rel. Reece v. Gies, 156 W. Va. 729, 198 S.E.2d 211 (1973).

12 Tennille v. Western Union Co., 774 F.3d 1249, 90 Fed. R. Serv. 3d 714 (10th Cir. 2014).

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XIII. Equal Protection of the Laws; Class Legislation

D. Equal Protection and Legal Proceedings

2. Appeals

§ 930. Rules as to taking of appeals in criminal cases as violating equal protection in legal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3046, 3816, 3817

Under the 14th Amendment, a state is not obliged to provide an appeal for criminal defendants.[1] However, the Equal Protection Clause requires that once a state establishes avenues of appellate review, those avenues must be kept free of unreasoned distinctions that can only impede the open and equal access to the courts.[2] When a criminal appeal has been provided by a state, unfairness results if a particular class of defendants are singled out by the state and denied meaningful access to the appellate system because of their membership in that class in violation of the Equal Protection Clause.[3]

Footnotes

1 Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).
There is no constitutional right to an appeal in a criminal case. Abney v. U. S., 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977); Estelle v. Dorrough, 420 U.S. 534, 95 S. Ct. 1173, 43 L. Ed. 2d 377 (1975); State v. Bussart-Savaloja, 40 Kan. App. 2d 916, 198 P.3d 163 (2008).
As to equal protection of the laws in criminal proceedings, generally, see Am. Jur. 2d, Criminal Law §§ 888 to 894.

2 Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974); Mayer v. City of Chicago, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971); Williams v. Oklahoma City, 395 U.S. 458, 89 S. Ct. 1818, 23 L. Ed. 2d 440 (1969); Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966); State v. Bussart-Savaloja, 40 Kan. App. 2d 916, 198 P.3d 163 (2008).
If a state has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of

a defendant, the procedures used in deciding appeals must comport with the demands of the Equal Protection Clause. Schweitzer v. Williams, 695 F. Supp. 2d 646 (N.D. Ohio 2010).

Equal protection of the laws requires that a minor, committed to a state institution for delinquency, be accorded an equal opportunity with adult offenders for a first appellate review of proceedings leading to his or her commitment, and such review must be effective for the full protection of his or her constitutional rights. Reed v. Duter, 416 F.2d 744 (7th Cir. 1969).

[3] Hart v. MCI Concord Superintendent, 36 F. Supp. 3d 186 (D. Mass. 2014).

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XIII. Equal Protection of the Laws; Class Legislation

E. Protection Against Discriminatory Administration of Laws

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Research References

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West's Key Number Digest, Constitutional Law 3045

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16B Am. Jur. 2d Constitutional Law § 931

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XIII. Equal Protection of the Laws; Class Legislation

E. Protection Against Discriminatory Administration of Laws

§ 931. Protection against discriminatory administration of laws, generally

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One purpose of the Equal Protection Clause is to protect every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents.[1] Thus, the guarantee of equal protection applies not only to facial legislative classifications but also to the administration of laws as well.[2] Equal protection can be violated by discriminatory administration of a law impartial on its face.[3] The Constitution not only forbids discriminatory laws making distinctions without a rational basis but also forbids the discriminatory and selective enforcement of nondiscriminatory laws.[4] The validity of a state statute under the Equal Protection Clause therefore often depends on how it is construed and applied.[5] Whether a statute or regulation valid on its face has been applied in a discriminatory manner is a factual question.[6] The Supreme Court has stated that a determination of this question is not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect; just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, so may a statute discriminatory on its face be nondiscriminatory in its operation.[7]

Although facially neutral laws that may have an impact on certain classes do not violate the Equal Protection Clause,[8] at least in the absence of an element of intentional or purposeful discrimination,[9] a provision not objectionable on its face may be adjudged unconstitutional because of its effect and operation.[10] A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make it unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution.[11] Hence, in a consideration of the classification embodied in a statute, regard should be given not only to its final purpose but likewise to the means provided for its administration.[12]

Footnotes

[1] PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013); A.N. by and through Ponder v. Syling, 928 F.3d 1191 (10th Cir. 2019); People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (App. Dep't Super. Ct. 1960); Crawford v. Kansas Dept. of Revenue, 46 Kan. App. 2d 464, 263 P.3d 828 (2011).

[2] Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996).
The unlawful administration by state officers of a facially fair state statute which results in its unequal application to persons who are entitled to be treated alike denies equal protection if it is the product of intentional or purposeful discrimination. Baluyut v. Superior Court, 12 Cal. 4th 826, 50 Cal. Rptr. 2d 101, 911 P.2d 1 (1996).

[3] U.S. v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969).

[4] People v. Utica Daw's Drug Co., 16 A.D.2d 12, 225 N.Y.S.2d 128, 4 A.L.R.3d 393 (4th Dep't 1962).

[5] Concordia Fire Ins. Co. v. People of State of Illinois, 292 U.S. 535, 54 S. Ct. 830, 78 L. Ed. 1411 (1934); Richey v. Wells, 123 Fla. 284, 166 So. 817 (1936); State v. Steurer, 37 Ohio App. 2d 51, 66 Ohio Op. 2d 89, 306 N.E.2d 425 (9th Dist. Summit County 1973).

[6] People v. Hirst, 31 Cal. App. 3d 75, 106 Cal. Rptr. 815 (4th Dist. 1973).

[7] American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 96 S. Ct. 1800, 48 L. Ed. 2d 263 (1976).

[8] Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (2007).
As a general rule, a law cannot be held unconstitutional merely because it is unfaithfully administered by those who are charged with its execution, even though its just interpretation is consistent with the Constitution. Thrift Hardware & Supply Co. v. City of Phoenix, 71 Ariz. 21, 222 P.2d 994, 22 A.L.R.2d 810 (1950).

[9] § 932.

[10] General Oil Co. v. Crain, 209 U.S. 211, 28 S. Ct. 475, 52 L. Ed. 754 (1908); East Coast Lumber Terminal v. Town of Babylon, 174 F.2d 106, 8 A.L.R.2d 1219 (2d Cir. 1949).

[11] Norris v. State of Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935); Cutsinger v. City of Atlanta, 142 Ga. 555, 83 S.E. 263 (1914); City of Portland v. Kitchen, 94 Or. 418, 186 P. 54 (1919).

[12] Adams v. City of Milwaukee, 228 U.S. 572, 33 S. Ct. 610, 57 L. Ed. 971 (1913); St. John v. People of State of New York, 201 U.S. 633, 26 S. Ct. 554, 50 L. Ed. 896 (1906).

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XIII. Equal Protection of the Laws; Class Legislation

E. Protection Against Discriminatory Administration of Laws

§ 932. What constitutes selective enforcement or discriminatory administration of laws

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Discriminatory Enforcement of Criminal Law, 13 Am. Jur. Proof of Facts 2d 609

Forms

Forms relating to racial profiling, see Am. Jur. Pleading and Practice Forms, Civil Rights [Westlaw®(r) Search Query]

Selective enforcement of a facially constitutional law or regulation does not, by itself, violate the Equal Protection Clause.[1] For example, certain violators may be selected for prosecution out of a class of all known violators, without violating the Equal Protection Clause, as the result of limited manpower or resources, in order to bring an appropriate case to test a new regulation or statute, or in view of an enforcement strategy directed only at serious violators.[2] Demonstration of different treatment from persons similarly situated, without more, does not establish malice or bad faith, for purposes of a claim for an equal protection violation based on selective treatment not relating to race, religion, or any intentional effort to punish a person for exercising his or her constitutional rights. A violation of equal protection by selective enforcement does arise, however, if a person, compared with others similarly situated, is selectively treated, if such selective treatment is based on impermissible considerations such as race, religion, or intent to inhibit or punish the exercise of constitutional rights, or if such selective treatment is based on a malicious or bad faith intent to injure a person.[3]

Observation:

Selective enforcement of motor vehicle laws on the basis of race, also known as racial profiling, is a violation of equal protection.[4]

Selective prosecution, if based upon improper motives, can also violate equal protection.[5] Thus, a statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right, although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.[6] A state also may not selectively deny protective services to certain disfavored minorities without violating the Equal Protection Clause.[7] Selective prosecution involving failure to prosecute all known lawbreakers, due either to ineptitude or lack of resources, resulting in people who are equally guilty of crimes or other violations receiving unequal treatment, is not a violation of equal protection; however, selective prosecution, where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, such as the right to free speech or the free exercise of religion, or because of membership in a vulnerable group, is actionable under the Equal Protection Clause.[8]

Mere errors of judgment by officials will not support a claim of discrimination violative of constitutional guarantees of equality.[9] Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination.[10] Even if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory; selective enforcement may be justified when (1) the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity, or (2) a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found.[11] Mere laxity in the administration of the law, no matter how long continued, is not and cannot be held to be a denial of equal protection.[12]

To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.[13] Thus, the Supreme Court has stated that the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination, which may appear on the face of the action taken with respect to a

particular class of persons, or may be shown by extrinsic evidence establishing a discriminatory design to favor one individual or class over another, not to be inferred from the action itself.[14] However, a discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination.[15]

It is a denial of equal protection of the law to make the execution of a statute dependent on the unbridled discretion of a single individual or an unduly limited group of individuals.[16]

Footnotes

1 Wright v. MetroHealth Medical Center, 58 F.3d 1130, 1995 FED App. 0207P (6th Cir. 1995); Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Gale v. North Dakota Bd. of Podiatric Medicine, 1997 ND 83, 562 N.W.2d 878 (N.D. 1997).
Selective enforcement of valid laws does not make a governmental action irrational so as to constitute an equal protection violation. Freeman v. City of Santa Ana, 68 F.3d 1180 (9th Cir. 1995), as amended on denial of reh'g and reh'g en banc, (Dec. 29, 1995).

2 Miriam Osborn Memorial Home Ass'n v. Chassin, 172 Misc. 2d 878, 658 N.Y.S.2d 156 (Sup 1996), order aff'd as modified on other grounds, 240 A.D.2d 143, 669 N.Y.S.2d 613 (2d Dep't 1998), aff'd as modified on other grounds, 100 N.Y.2d 544, 762 N.Y.S.2d 867, 793 N.E.2d 404 (2003).

3 Whren v. U.S., 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); U.S. v. Frazier, 408 F.3d 1102 (8th Cir. 2005); Lener v. Hempstead Public Schools, 55 F. Supp. 3d 267, 316 Ed. Law Rep. 61 (E.D. N.Y. 2014); Thomas v. Town of Southeast, 336 F. Supp. 3d 317 (S.D. N.Y. 2018); Hunt v. Prior, 236 Conn. 421, 673 A.2d 514 (1996).
A young black man was not denied equal protection when he alone, out of a group of six other youths the rest of whom were white, was subjected to alleged excessive force and interrogation after the group was stopped by the police responding to a disturbing the peace complaint; when all the names of the group were reported to the police dispatcher, the dispatcher told the arresting officer that the claimant had the same last name as a suspected bank robber, belying a racial basis for his mistreatment. Arrington ex rel. Arrington v. City of Davenport, 240 F. Supp. 2d 984 (S.D. Iowa 2003).

4 Flowers v. Fiore, 239 F. Supp. 2d 173 (D.R.I. 2003), judgment aff'd, 359 F.3d 24 (1st Cir. 2004).

5 Gale v. North Dakota Bd. of Podiatric Medicine, 1997 ND 83, 562 N.W.2d 878 (N.D. 1997).

6 Little v. Streater, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981).

7 DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990).
A municipality is not constitutionally required to protect an individual against private violence, but it may not, without violating the Equal Protection Clause, operate under a custom in which it selectively denies its protective services to certain disfavored minorities. Ricketts v. City of Columbia, Mo., 36 F.3d 775 (8th Cir. 1994).
As to the general rule that the state is not constitutionally obligated to protect individuals against private violence, see § 970.

8 Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995).
A defendant produced no evidence tending to support her claim of an equal protection violation in the selective prosecution of women, but not men, for disorderly conduct for appearing topless in public; there was no evidence that women anywhere were prosecuted when men allegedly doing the same thing were not prosecuted under similar circumstances. Carreras v. State, 936 S.W.2d 727 (Tex. App. Houston 14th Dist. 1996), petition for discretionary review refused, (June 4, 1997).

9 Sunday Lake Iron Co. v. Wakefield Tp., 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918); People v. Gordon, 105 Cal. App. 2d 711, 234 P.2d 287 (1st Dist. 1951).
An accused's contention that the state has denied him or her the procedural safeguards the state law affords to others to ensure an unbiased grand jury comes down to a contention that state law was misapplied; such misapplication cannot be shown to be an invidious discrimination. Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962).

[10] Mackay Telegraph & Cable Co. v. City of Little Rock, 250 U.S. 94, 39 S. Ct. 428, 63 L. Ed. 863 (1919); State v. Solomon, 245 S.C. 550, 141 S.E.2d 818, 14 A.L.R.3d 1277 (1965).
Mere inequalities in the administration of the law violate no constitutional right. Schreiber v. Cook County, 388 Ill. 297, 58 N.E.2d 40, 155 A.L.R. 1162 (1944).
Failure to prosecute all possible violators of law is not, per se, contrary to Equal Protection Clause of 14th Amendment. State v. Jacobsen, 78 Wash. 2d 491, 477 P.2d 1 (1970).

[11] People v. Utica Daw's Drug Co., 16 A.D.2d 12, 225 N.Y.S.2d 128, 4 A.L.R.3d 393 (4th Dep't 1962).

[12] People v. Dobbs Ferry Medical Pavillion Inc., 69 Misc. 2d 886, 332 N.Y.S.2d 186 (Sup 1972); Sims v. Cunningham, 203 Va. 347, 124 S.E.2d 221 (1962).

[13] Ganz v. Justice Court for Arvin-Lamont Judicial Dist., 273 Cal. App. 2d 612, 78 Cal. Rptr. 348 (5th Dist. 1969); Hay v. Grow Tp., Anoka County, 296 Minn. 1, 206 N.W.2d 19 (1973); Barber's Super Markets, Inc. v. City of Grants, 1969-NMSC-115, 80 N.M. 533, 458 P.2d 785 (1969); S. S. Kresge Co. v. State, 546 S.W.2d 928 (Tex. Civ. App. Dallas 1977), writ refused n.r.e., (June 29, 1977).
A defendant cannot claim unequal enforcement of the law absent any pattern of consciously practiced discrimination. People v. Eason, 40 N.Y.2d 297, 386 N.Y.S.2d 673, 353 N.E.2d 587 (1976).
An official's failure to act on a sand excavation permit application and the subsequent issuance of a useless permit which excluded the area of plaintiff's land containing sand dunes were due to political pressure and thereby denied plaintiff equal protection. Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir. 1976).

[14] Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944).
The collective bargaining agent for blue-collar and clerical employees of a city failed to prove that an ordinance which required city employees to reside within the city was selectively enforced against one city employee where the city provided evidence of enforcement of the ordinance against a different employee who chose to reside outside the city. Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265 (3d Cir. 1994).

[15] Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944); Barber's Super Markets, Inc. v. City of Grants, 1969-NMSC-115, 80 N.M. 533, 458 P.2d 785 (1969); People v. Goodman, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139 (1972).
To prevail on a claim of selective enforcement, a plaintiff must show that he or she was singled out from others similarly situated or that his or her prosecution was improperly motivated. Sanjour v. E.P.A., 56 F.3d 85 (D.C. Cir. 1995) (claim of selective enforcement by employee); 2025 Emery Highway, L.L.C. v. Bibb County, Georgia, 377 F. Supp. 2d 1310 (M.D. Ga. 2005), aff'd, 218 Fed. Appx. 869 (11th Cir. 2007).
Any difference in treatment of a property owner and others by town officials, with respect to occupancy and well permits and related matters, was not due to a malicious or bad faith intent to injure her, and thus did not constitute a "class of one" equal protection violation, where the property owner offered nothing to show that the officials engaged in an orchestrated and spiteful effort to "get" her, and her property developments came to the officials' attention repeatedly because of her violations of ordinances and regulations, often as a result of her neighbors' complaints. Walsh v. Town of Lakeville, 431 F. Supp. 2d 134 (D. Mass. 2006).

[16] Mahon v. Sarasota County, 177 So. 2d 665 (Fla. 1965).

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XIV. Due Process of Law

A. In General

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XIV. Due Process of Law

A. In General

§ 933. Constitutional provisions for due process of law, generally

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West's Key Number Digest

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The guarantee of due process found in the Fifth Amendment of the United States Constitution declares that no person will "be deprived of life, liberty, or property without due process of law."[1] The 14th Amendment declares that no state will "deprive any person of life, liberty, or property without due process of law" and is a limitation only upon the powers of the states.[2]

The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power.[3] The mere deprivation by state action of a constitutionally protected interest is not in itself unconstitutional. What is unconstitutional is the deprivation of such an interest without due process of law.[4] The cornerstone of due process is the prevention of abusive governmental power,[5] and to prove a due-process claim, the plaintiff must show that he or she has been deprived of a protected interest without due process of law.[6]

The protections of due process do not apply to the indirect adverse effects of governmental action.[7] The restraint imposed upon legislation by the Due Process Clauses of the Fifth and 14th Amendments is the same.[8] The Due Process Clause of the 14th Amendment imposes no more stringent requirements upon state officials than does the Due Process Clause of the Fifth Amendment upon their federal counterparts.[9] Thus, incorporated Bill of Rights guarantees are enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment; if a Bill of Rights protection is incorporated by the Fourteenth Amendment's Due Process Clause, and thus enforced against the States, there is no daylight between the federal and state conduct it prohibits or requires.[10]

Reminder:

Some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against

state action, because a denial of them would be a denial of due process of law. This is not because those rights are enumerated in the first eight amendments but because they are of such a nature that they are included in the conception of due process of law. The general test as to whether a right is so included in the Due Process Clause of the 14th Amendment was said to be: "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law." Thereafter, in numerous decisions affirming in principle what it had intimated before, the Supreme Court laid down the rule which is now the accepted and settled principle, that the Due Process Clause requires that state action, through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[11]

A state adopting the language of the 14th Amendment to the United States Constitution in its own Bill of Rights adopts with it the interpretation it has received.[12] Where the Due Process Clause of a state constitution is not more restrictive than the Due Process Clause of the 14th Amendment to the United States Constitution; the decision of a case under the 14th Amendment will also dispose of questions raised under the state constitution.[13]

CUMULATIVE SUPPLEMENT

Cases:

Due process analysis requires first a determination that due process applies and then what process is due. U.S. Const. Amend. 14; N.J. Const. art. 1, par. 1. S.C. v. New Jersey Department of Children and Families, 242 N.J. 201, 231 A.3d 576 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Amend. V.
In addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, have children, direct the education and upbringing of one's children, marital privacy, use contraception, bodily integrity, and abortion. Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

2 § 965.

3 J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011); Gordon v. Holder, 721 F.3d 638 (D.C. Cir. 2013); Knepfle v. J-Tech Corporation, 419 F. Supp. 3d 1281 (M.D. Fla. 2019); Book v. Doublestar Dongfeng Tyre Co., Ltd., 860 N.W.2d 576 (Iowa 2015); Dutch Run-Mays Draft, LLC v. Wolf Block, LLP, 450 N.J. Super. 590, 164 A.3d 435 (App. Div. 2017).

4 Wallace v. Tilley, 41 F.3d 296, 30 Fed. R. Serv. 3d 1317 (7th Cir. 1994); Gilbert v. North Carolina State Bar, 363 N.C. 70, 678 S.E.2d 602 (2009).

5 Weimer v. Amen, 870 F.2d 1400 (8th Cir. 1989).

6 American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999); Elmco Properties, Inc. v. Second Nat. Federal Sav. Ass'n, 94 F.3d 914 (4th Cir. 1996).

[7] O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980); Dejean v. Purpera, 206 So. 3d 199 (La. 2016).
Procedural due-process protections do not extend to those who suffer indirect harm from government actions; likewise, indirect beneficiaries of government programs have no due-process rights as to the programs. Dumas v. Kipp, 90 F.3d 386, 111 Ed. Law Rep. 124 (9th Cir. 1996).

[8] Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (1932).
The due-process provisions found in the federal and the Iowa Constitution are nearly identical in scope, import, and purpose, and the state supreme court usually interprets both in a similar fashion. Holm v. Iowa Dist. Court for Jones County, 767 N.W.2d 409 (Iowa 2009), as amended, (July 6, 2009).

[9] Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); Al-Turki v. Tomsic, 926 F.3d 610 (10th Cir. 2019).

[10] Timbs v. Indiana, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019).

[11] § 414.

[12] Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954).
U.S. Const. Amend. XIV.

[13] Anderson v. City of St. Paul, 226 Minn. 186, 32 N.W.2d 538 (1948).
U.S. Const. Amend. XIV.

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16B Am. Jur. 2d Constitutional Law § 934

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XIV. Due Process of Law

A. In General

§ 934. Origin of due-process guarantee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3846

Although the Fifth Amendment to the United States Constitution is the first instance in which a written constitution limited the powers of government by declaring that no person will be deprived of life, liberty, or property without due process of law, the principle that no person should be deprived of life, liberty, or property except by due process of law did not originate in the American system of constitutional law[1] but was contained in the Magna Carta as a part of the ancient English liberties.[2] Chapter 39 of the Magna Carta, confirmed on June 19, 1215, declared: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."[3] This has been a fundamental rule in the judicial system of every state in the Union which has adopted the common law.[4]

Observation:

Among the historic liberties protected by due process under the United States Constitution is the right to be free from and to obtain judicial relief for unjustified intrusions on personal security.[5]

Footnotes

[1] Davidson v. City of New Orleans, 96 U.S. 97, 24 L. Ed. 616, 1877 WL 18471 (1877).
Due process is a historical product. Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

[2] Munn v. People of State of Illinois, 94 U.S. 113, 24 L. Ed. 77, 1876 WL 19615 (1876); Deal v. Brooks, 2016 OK CIV APP 81, 389 P.3d 375 (Div. 2 2016).

[3] Paulson v. City of Portland, 16 Or. 450, 19 P. 450 (1888), aff'd, 149 U.S. 30, 13 S. Ct. 750, 37 L. Ed. 637 (1893).

[4] Davidson v. City of New Orleans, 96 U.S. 97, 24 L. Ed. 616, 1877 WL 18471 (1877); Moses v. U.S., 16 App. D.C. 428, 50 L.R.A. 532, 1900 WL 129762 (App. D.C. 1900).

[5] Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

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XIV. Due Process of Law

A. In General

§ 935. Due process as related to common law and fundamental rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840 to 3846, 3870

The Due Process Clauses provide heightened protection against government interference with certain fundamental rights and liberty interests.[1]

Rights are "fundamental," requiring a governmental regulation infringing those rights to be narrowly tailored to serve a compelling state interest,[2] when they are implicit in the concept of ordered liberty or deeply rooted in the nation's history and tradition.[3] Choices about marriage, family life, and the upbringing of children are among the associational rights ranked as of basic importance in our society and are rights sheltered by the 14th Amendment against the state's unwarranted usurpation, disregard, or disrespect.[4]

The common law is the foundation of that which is designated as due process of law.[5] Traditional practice under the common law provides a touchstone for analysis, under the Due Process Clause of the 14th Amendment, of a state's abrogation of common-law procedures but not all deviations from established common-law procedures result in some constitutional infirmity under the Due Process Clause since to hold all procedural changes unconstitutional would be to deny every quality of the law but its age and to render it incapable of progress or improvement.[6]

Common-law rights must be distinguished from, as they are not the equivalent of, fundamental rights. Fundamental rights are recognized by the United States Constitution itself and are protected by substantive due process. Common-law rights are protected only by procedural due process.[7]

CUMULATIVE SUPPLEMENT

Cases:

The fundamental rights and liberty interests protected from governmental interference by substantive due process under the Fourteenth Amendment include the specific freedoms protected by the Bill of Rights, as well as the right to marry, have children, direct the education and upbringing of those children, marital privacy, the use of contraception, bodily integrity, and abortion. U.S. Const. Amend. 14. Spencer v. City of Hendersonville, 487 F. Supp. 3d 661 (M.D. Tenn. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors, 205 P.3d 326 (Alaska 2009); In re N.N.N., 985 A.2d 1113 (D.C. 2009); D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013); Interest of N.G., 577 S.W.3d 230 (Tex. 2019).

2 § 956.

3 Bryant v. New York State Educ. Dept., 692 F.3d 202, 284 Ed. Law Rep. 1 (2d Cir. 2012); Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995); Saucon Valley Manor, Inc. v. Miller, 392 F. Supp. 3d 554 (E.D. Pa. 2019); Fleming v. State, 376 S.W.3d 854 (Tex. App. Fort Worth 2012), petition for discretionary review granted, (Jan. 9, 2013) and judgment aff'd, 455 S.W.3d 577 (Tex. Crim. App. 2014).
Investors' interest in maintaining a maximum return on their investment is not a "fundamental right." National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995).

4 M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996); Spiegel v. Rabinovitz, 121 F.3d 251 (7th Cir. 1997).

5 Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

6 Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994).

7 DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F.3d 956 (11th Cir. 1997).

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XIV. Due Process of Law

A. In General

§ 936. Due process as related to congressional power

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840 to 3842, 3865

The Fifth Amendment is a limitation upon the powers of Congress only.[1] While Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.[2] The guarantee of due process bars Congress from making enactments that shock the sense of fair play.[3] On the other hand, under the Fifth Amendment's Due Process Clause, Congress is free to adjust the burdens and benefits of economic life as long as it does so in a manner that is neither arbitrary nor irrational.[4]

Observation:

Congress also has broad discretion to legislate to enforce the core promises of the 14th Amendment. An explicit declaration by Congress that legislation is being passed to enforce the 14th Amendment is the simplest way to meet the first requirement for determining whether the legislation is a valid exercise of Congress's power. If Congress does not explicitly identify the source of its power as the 14th Amendment when enacting legislation, there must be something about the legislation connecting it to recognized 14th Amendment aims.[5]

The principles embodied in the Fifth Amendment's Due Process Clause have been found not to be coextensive with the prohibitions existing against state impairment of preexisting contracts, and the standards imposed on congressional economic legislation by the Due Process Clauses are less searching.[6] Thus, economic legislation, enacted under Congress's Commerce Clause power, is entitled to the most deferential level of judicial scrutiny, and where the legislation is purely economic and

does not abridge fundamental rights, the challenger must show that Congress has acted in an arbitrary and irrational way in enacting it; in other words, as long as the state's objective is legitimate, and the taxonomy adopted is rationally related to achieving that objective, then the law does not transgress due process.[7]

Footnotes

1 Morin v. Caire, 77 F.3d 116, 144 A.L.R. Fed. 719 (5th Cir. 1996) (holding that the Fifth Amendment's Due Process Clause applies only to actions of the federal government and not to actions of a municipal government); Wilson v. Formigoni, 42 F.3d 1060 (7th Cir. 1994).
Congress is subject to the requirements of the Due Process Clause of the Fifth Amendment (U.S. Const. Amend. V) when legislating in the area of military affairs. Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).

2 U.S. v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

3 Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

4 Bowen v. Gilliard, 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987) (change in AFDC benefits).

5 City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997); Wilson-Jones v. Caviness, 99 F.3d 203, 1996 FED App. 0343P (6th Cir. 1996), opinion amended on other grounds on denial of reh'g, 107 F.3d 358 (6th Cir. 1997).

6 Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).
Federal economic legislation, which is not subject to the constraints coextensive with those imposed upon the states by the contract clause, is subject to due-process review only for rationality. Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996).

7 Catlin v. Sobol, 93 F.3d 1112, 18 A.D.D. 146, 111 Ed. Law Rep. 1114 (2d Cir. 1996); State v. Champoux, 252 Neb. 769, 566 N.W.2d 763 (1997).
Federal economic legislation is subject to due-process review under the Fifth Amendment only for rationality. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).
A party challenging a government action as violative of substantive due process must show that the government decision was not rationally related to a legitimate state interest. Valot v. Southeast Local School Dist. Bd. of Educ., 107 F.3d 1220, 1997 FED App. 0087P (6th Cir. 1997).

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XIV. Due Process of Law

A. In General

§ 937. Due process as federal or state question

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840 to 3842

Even though state law plays a role in determining the existence of property[1] or liberty interests which are protected by the Due Process Clause, whether a property interest is protected for purposes of substantive due process is a question that is not answered by reference to state law,[2] and the ultimate question of the degree of due-process protection to be afforded under the Due Process Clause remains a federal one[3] for the Due Process Clause does not require a state to implement its own law correctly nor does the United States Constitution insist that local government be right. If state law grants more procedural rights than the United States Constitution would otherwise require, the state's failure to abide by that law is not a federal due-process issue.[4] Converting alleged violations of state law into federal due-process claims improperly bootstraps state law into the United States Constitution.[5]

Observation:

A rational basis review under the Due Process Clause does not authorize the federal judiciary to sit as a superlegislature to judge the wisdom or desirability of state legislative policy determinations.[6]

Footnotes

[1] Kelly v. Borough of Sayreville, N.J., 107 F.3d 1073 (3d Cir. 1997) (finding state law creates the property rights protected by the 14th Amendment); DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F.3d 956 (11th Cir. 1997) (finding that land use rights as property rights generally are state-created rights protected by procedural due process rather than substantive due process).
Administrative actions may not create property rights for purposes of the Due Process Clause where that result would contravene the intent of the legislature. Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32 (D.C. Cir. 1997).

[2] Musila v. Lock Haven University, 970 F. Supp. 2d 384, 302 Ed. Law Rep. 1013 (M.D. Pa. 2013).

[3] Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178, 1997 FED App. 0080P (6th Cir. 1997), judgment rev'd on other grounds, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998); Sowich v. County of Oneida, 35 Misc. 3d 486, 938 N.Y.S.2d 413 (Sup 2011), order aff'd, 109 A.D.3d 1170, 971 N.Y.S.2d 720 (4th Dep't 2013).
Due-process requirements are defined by the United States Constitution and do not vary from state to state on the happenstance of a particular state's procedural rules. Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).
Where a liberty or property interest is infringed, the process which is due under the United States Constitution is that which is measured by the Due Process Clause, not that called for by state regulations. Giovanni v. Lynn, 48 F.3d 908 (5th Cir. 1995).

[4] Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

[5] FM Properties Operating Co. v. City of Austin, 93 F.3d 167 (5th Cir. 1996).

[6] § 955.

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840 to 3842, 3846, 3847, 3861, 3865 to 3912, 3920 to 3932, 3935 to 3945

A.L.R. Library

A.L.R. Index, Due Process
A.L.R. Index, Fifth Amendment
A.L.R. Index, Fourteenth Amendment
West's A.L.R. Digest, Constitutional Law 3840 to 3842, 3846, 3847, 3861, 3865 to 3912, 3920 to 3932, 3935 to 3945

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16B Am. Jur. 2d Constitutional Law § 938

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 938. Nature and scope of due-process guarantee, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840 to 3842, 3865 to 3912

A.L.R. Library

Due Process Afforded in Drug Court Proceeding, 78 A.L.R.6th 1

The guarantee of due process of law is one of the most important to be found in the United States Constitution or any of the amendments thereto.[1] It has been stated that no other phrase known to the American and English law comprehends so much that which is basically vital in the protection of human rights and the redress of human wrongs as the phrase "due process of law."[2] The notion reflects and describes the concept of ordered liberty.[3]

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than a mere absence of physical restraint.[4] For instance, the right to hold a specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment.[5] Moreover, due process requires that matters have sufficient contacts with a state in order for that state's laws to be applied; the parties' consent to apply the law of a particular forum state is not sufficient standing alone.[6]

Due process of law is the primary and indispensable foundation of individual freedoms. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[7] The fundamental guarantee of due process is absolute and not merely relative.[8] It does not have regard merely to enforcement of

the law but searches also the authority for making the law, and it is not merely a political right but is a legal right assertable in the courts.[9] By reason of this guarantee, everyone is entitled to the protection of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions[10] and that have long been recognized under the common-law system[11] and which are not infrequently designated as the "law of the land."[12] The fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment include most of the rights enumerated in the Bill of Rights, and in addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.[13]

A state's obligations under the 14th Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due.[14] In evaluating a due-process claim, a court must determine whether a property or liberty interest exists and, if so, what procedures are constitutionally required to protect that right.[15]

Caution:

When a particular Bill of Rights provision has been made applicable to the states by the 14th Amendment[16] and provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment and not some more generalized notion of substantive due process must be the guide for analyzing claims.[17]

Observation:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, even though they set forth independent principles.[18] Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other, and in any particular case one clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[19]

CUMULATIVE SUPPLEMENT

Cases:

Foreign citizens in the United States may enjoy certain constitutional rights, such as the right to due process in a criminal trial. U.S. Const. Amend. 5. Agency for International Development v. Alliance for Open Society International, Inc., 140 S. Ct. 2082, 207 L. Ed. 2d 654 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Ulman v. City of Baltimore, 72 Md. 587, 20 A. 141 (1890).

2 State ex rel. Hoel v. Brown, 105 Ohio St. 479, 1 Ohio L. Abs. 230, 138 N.E. 230 (1922).

3 Wolf v. People of the State of Colo., 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (overruled on other grounds by, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961)); Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995).

4 Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

5 Bruns v. National Credit Union Admin., 122 F.3d 1251 (9th Cir. 1997).

6 Schoffman v. Central States Diversified, Inc., 69 F.3d 215 (8th Cir. 1995).

7 Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

8 Hammond Packing Co. v. State of Ark., 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909).

9 State v. Henry, 1933-NMSC-080, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805 (1933).

10 Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403, 94 L. Ed. 381 (1950) (holding that the Due Process Clause expresses deeply rooted notions of justice); State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)); Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947).
The test to measure the validity of a state statute under the Due Process Clause of the 14th Amendment is whether the statute is contrary to the fundamental principles of liberty and justice. Petition of Groban, 352 U.S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376, 76 Ohio L. Abs. 368 (1957).
Considerations of due process involve common-sense reasoning and fundamental fairness. In re F.C., III, 2009 PA Super 9, 966 A.2d 1131 (2009), order aff'd, 607 Pa. 45, 2 A.3d 1201 (2010).

11 Butler v. Perry, 240 U.S. 328, 36 S. Ct. 258, 60 L. Ed. 672 (1916); Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241 (1931).

12 Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948).
As to the synonymity of "due process" and "law of the land," generally, see § 943.

13 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
As to incorporation of Bill of Rights by Due Process Clause of Fourteenth Amendments, see § 414.

14 Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

15 Bzdzuich v. U.S. Drug Enforcement Admin., 76 F.3d 738, 1996 FED App. 0059P (6th Cir. 1996).
Whether an interest is protected by due process depends not on its weight but on its nature. National Collegiate Athletic Assn v. Yeo, 171 S.W.3d 863, 202 Ed. Law Rep. 403 (Tex. 2005).

16 § 414.

17 Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); Patel v. Penman, 103 F.3d 868 (9th Cir. 1996); Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).

18 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

19 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
Equal protection, generally, see §§ 817 to 932.

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Works.

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 939. Defining due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840, 3841, 3865, 3866, 3875

The difficulty of defining the phrase "due process of law" has been repeatedly recognized.[1] It would be very difficult, if not impossible, to frame a definition of the term which would be accurate, complete, and appropriate under all circumstances.[2] While the Due Process Clause centrally concerns the fundamental fairness of governmental activity,[3] applying the clause is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.[4] That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, and thus violative of due process may, in other circumstances and in the light of other considerations, fall short of such denial.[5]

The United States Supreme Court has never attempted to define with precision the words "due process of law."[6] In fact, the phrase probably never can be defined so as to draw a clear and distinct line, applicable to all cases, between proceedings which constitute due process of law and those which do not.[7]

The term "due process of law" asserts a fundamental principle of justice rather than a specific rule of law and thus is not susceptible of more than a general statement of its intent and meaning which are ascertained in the history of its specific applications to cases requiring judicial decisions.[8] The primary guide in determining whether a principle is a fundamental principle of justice protected by the Due Process Clause is historical practice.[9] The rule that what free people have found consistent with their enjoyment of freedom for centuries is not to be deemed to violate due process does not freeze due process within the confines of historical facts or discredited attitudes, it being of the very nature of a free society to advance in its standards of what is deemed reasonable and right.[10] The courts usually have contented themselves in ascertaining the intent and application of this important phrase with the process of judicial inclusion and exclusion as the cases presented for decision have arisen.[11] The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the court to draw it by the gradual and

empiric process of inclusion and exclusion.[12]

Due process is an elusive concept; its exact boundaries are undefinable, and its content varies according to specific factual contexts.[13] The doctrine of a particular case is not allowed to end with its enunciation, and an expression in an opinion yields later to the impact of facts unforeseen.[14] Thus, due-process rights are malleable ones that are designed to ensure that individuals are treated with fundamental fairness in light of the given situation and the interests at stake.[15] The content of due process is a function of many variables, including the nature of the right affected, the degree of danger caused by the proscribed condition or activity, and the availability of prompt remedial measures.[16] It also depends, to some extent, on which powers of government are being exercised and the purposes to be accomplished.[17]

The United States Constitution does not declare what principles are to be applied to ascertain whether there has been due process of law.[18] No single model of procedural fairness, let alone particular form of procedure, is dictated by the Due Process Clause.[19] Thus, due process is not a technical conception with a fixed content unrelated to time, place, and circumstances.[20] Representing a profound attitude of fairness, due process is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith.[21] It is not an inflexible procedure universally applicable to every imaginable situation.[22] Instead, due process is flexible and calls for such procedural protections as the particular situation demands.[23]

Due process is not so rigid as to require that the significant interest in informality, flexibility, and economy must always be sacrificed.[24] In other words, due process requires more as the stakes, and therefore, the costs of error rise.[25]

Footnotes

1 Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928); People v. Harris, 104 Colo. 386, 91 P.2d 989, 122 A.L.R. 1034 (1939); City of Missoula v. Mountain Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113 (2016); D.W. v. A.G., 303 Neb. 42, 926 N.W.2d 651, 365 Ed. Law Rep. 1305 (2019); Com. v. Turner, 622 Pa. 318, 80 A.3d 754 (2013); Tennessee Cent. Ry. Co. v. Pharr, 183 Tenn. 658, 194 S.W.2d 486 (1946); In re Dependency of K.N.J., 171 Wash. 2d 568, 257 P.3d 522 (2011), as modified on denial of reconsideration, (Aug. 2, 2011).

2 Sproles v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); Rogal v. American Broadcasting Companies, Inc., 74 F.3d 40, 34 Fed. R. Serv. 3d 388 (3d Cir. 1996); Kennedy v. Truss, 40 Del. 424, 13 A.2d 431 (Super. Ct. 1940); Watkins v. Dodson, 159 Neb. 745, 68 N.W.2d 508 (1955).
The requirements of due process cannot be ascertained through the mechanical application of a formula. Groppi v. Leslie, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972).

3 North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213, 204 L. Ed. 2d 621 (2019); City of Missoula v. Mountain Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113 (2016); Robinson v. Morrill County School District #63, 299 Neb. 740, 910 N.W.2d 752, 354 Ed. Law Rep. 524 (2018); Com. v. Turner, 622 Pa. 318, 80 A.3d 754 (2013); In re Dependency of K.N.J., 171 Wash. 2d 568, 257 P.3d 522 (2011), as modified on denial of reconsideration, (Aug. 2, 2011).

4 Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); In re Rood, 483 Mich. 73, 763 N.W.2d 587 (2009).
Fundamental fairness, as the standard for analyzing a due-process claim under the state constitution, requires that government conduct conform to the community's sense of justice, decency, and fair play. State v. Veale, 158 N.H. 632, 972 A.2d 1009 (2009).

5 Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) (overruled on other grounds by, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963)) (finding that in the application of the concept of due process, there is always the danger of falling into the habit of formulating the guarantee into a set of hard-and-fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed).

6 Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948); Roseman v. Fidelity & Deposit Co. of Maryland, 154 Misc. 320, 277 N.Y.S. 471 (N.Y. City Ct. 1935).

7 Freeland v. Williams, 131 U.S. 405, 9 S. Ct. 763, 33 L. Ed. 193 (1889); Southern Pac. Co. v. Railroad Commission of Cal., 13 Cal. 2d 89, 87 P.2d 1055 (1939).
Due process has never been, and perhaps can never be, precisely defined. Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

8 Territory of Alaska v. Craig Enterprises, Inc., 355 P.2d 397, 84 A.L.R.2d 1082 (Alaska 1960).

9 Montana v. Egelhoff, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).

10 Frank v. State of Md., 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959) (overruled in part on other grounds by, Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)).

11 International Broth. of Teamsters, Local 695, A.F.L. v. Vogt, Inc., 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957); O'Kane v. State, 283 N.Y. 439, 28 N.E.2d 905 (1940).

12 Wolf v. People of the State of Colo., 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (overruled on other grounds by, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961)).
Even though the concept of due process of law is not final and fixed, its limits are derived from considerations that are fused in the whole nature of the judicial process. Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

13 Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); In re Tucker, 5 Cal. 3d 171, 95 Cal. Rptr. 761, 486 P.2d 657 (1971).

14 International Broth. of Teamsters, Local 695, A.F.L. v. Vogt, Inc., 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957).

15 State v. Simpkins, 117 Ohio St. 3d 420, 2008-Ohio-1197, 884 N.E.2d 568 (2008).

16 Thorn v. Superior Court, 1 Cal. 3d 666, 83 Cal. Rptr. 600, 464 P.2d 56 (1970).

17 Harmon v. Bolley, 187 Ind. 511, 120 N.E. 33, 2 A.L.R. 609 (1918) (overruled in part on other grounds by, Board of Com'rs of Wells County v. Falk, 221 Ind. 376, 47 N.E.2d 320, 145 A.L.R. 1190 (1943)).

18 French v. Barber Asphalt Pav. Co., 181 U.S. 324, 21 S. Ct. 625, 45 L. Ed. 879 (1901).

19 Kremer v. Chemical Const. Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

20 Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Cinea v. Certo, 84 F.3d 117 (3d Cir. 1996); Clancy v. Office of Foreign Assets Control of U.S. Dept. of Treasury, 559 F.3d 595 (7th Cir. 2009); In re DeLeon J., 290 Conn. 371, 963 A.2d 53 (2009); Vincent v. Eastern Shore Markets, 970 A.2d 160 (Del. 2009); State v. Lynn, 129 Ohio St. 3d 146, 2011-Ohio-2722, 950 N.E.2d 931 (2011).

21 Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980).

22 Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961); University of Texas Medical School at Houston v. Than, 901 S.W.2d 926, 101 Ed. Law Rep. 1251 (Tex. 1995).

23 Jennings v. Rodriguez, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018); Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Clancy v. Office of Foreign Assets Control of U.S. Dept. of Treasury, 559 F.3d 595 (7th Cir. 2009); Reams v. Irvin, 561 F.3d 1258 (11th Cir. 2009); H.S. v. N.S., 173 Cal. App. 4th 1131, 93 Cal. Rptr. 3d 470 (4th Dist. 2009); In re DeLeon J., 290 Conn. 371, 963 A.2d 53 (2009); School Bd. of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009); Theisen v. Theisen, 382 S.C. 213, 676 S.E.2d 133 (2009).

24 Little v. Streater, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981).

[25] Yang v. I.N.S., 109 F.3d 1185 (7th Cir. 1997).
The degree of procedural protection required by the Due Process Clause is proportional to the extent of the deprivation. Cinea v. Certo, 84 F.3d 117 (3d Cir. 1996).
Procedural due-process protections are defined in accordance with the magnitude of the public interest at stake; if public safety is at issue, liberty or property interests can be deprived even without a prior hearing. McCormick v. Stalder, 105 F.3d 1059 (5th Cir. 1997).

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16B Am. Jur. 2d Constitutional Law § 940

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 940. Defining due process—Judicially crafted definitions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840, 3865

While no precise definition of the phrase "due process of law" can be given,[1] the courts have frequently defined the phrase in general terms.[2] Due process of law must be understood to mean law in the regular course of administration through the courts of justice[3] and according to those rules and forms which have been established for the protection of private rights.[4] Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are implicit in the concept of ordered liberty.[5]

In its broadest sense, due process means that every citizen will hold his or her life, liberty, property, and immunities under the protection of the general rules which govern society.[6] Due process protects the right to make an effective case against deprivation by the government, not the right against involuntary self-prejudice.[7] Increasingly in modern jurisprudence, the term has come to represent a realistic and reasonable evaluation of the respective interests of plaintiffs, defendants, and the state under the circumstances of the particular case.[8]

Achieving an acceptable error rate is an important element of the due-process calculus.[9] A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right, and affecting all persons alike is due process of law.[10] Due process has to do with the denial of fundamental fairness which is shocking to the universal sense of justice; it deals neither with power nor with jurisdiction but with their exercise.[11]

The term "due process of law" includes all the steps essential to deprive a person of life, liberty, or property. It includes all the forms and acts essential to its application and to give effect to it. The means that may be employed to accomplish the purpose of the law is the process; in other words, "process" is the mode by which the purpose of the law may be effected.[12] The hallmark of "property" under the 14th Amendment's Due Process Clause is an individual entitlement grounded in state

law which cannot be removed except for cause. Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating to the whole domain of social and economic fact.[13]

Footnotes

1 § 939.

2 §§ 945, 954, 961.

3 Brown v. State of New Jersey, 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899); Sexton v. Barry, 233 F.2d 220, 1 Ohio Op. 2d 231, 75 Ohio L. Abs. 71 (6th Cir. 1956); Tennessee Cent. Ry. Co. v. Pharr, 183 Tenn. 658, 194 S.W.2d 486 (1946).

4 Endicott-Johnson Corporation v. Smith, 266 U.S. 291, 45 S. Ct. 63, 69 L. Ed. 293 (1924); Ex parte Wilkey, 233 Ala. 375, 172 So. 111 (1937); State ex rel. Gore v. Chillingworth, 126 Fla. 645, 171 So. 649 (1936); Winter v. Barrett, 352 Ill. 441, 186 N.E. 113, 89 A.L.R. 1398 (1933); State v. McClintick, 23 Ohio Misc. 194, 51 Ohio Op. 2d 298, 52 Ohio Op. 2d 188, 255 N.E.2d 885 (C.P. 1970); Prescott v. State, 56 Okla. Crim. 259, 37 P.2d 830 (1934); Tennessee Cent. Ry. Co. v. Pharr, 183 Tenn. 658, 194 S.W.2d 486 (1946).

5 Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).
Due process of law is not an exact concept; generally, it implies conformity with the natural and inherent principles of justice for the protection of individual rights, forbids the taking of one's property without compensation, and requires that no one be condemned in person or property without an opportunity to be heard, and such opportunity to be heard must be full and fair, not merely colorable or elusive. State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959).
The concept of due process of law embraces fundamental rights and immutable principles of justice. People v. Terra, 303 N.Y. 332, 102 N.E.2d 576 (1951).

6 State ex rel. Hoel v. Brown, 105 Ohio St. 479, 1 Ohio L. Abs. 230, 138 N.E. 230 (1922).

7 Harris v. Wright, 93 F.3d 581 (9th Cir. 1996).

8 Dobkin v. Chapman, 21 N.Y.2d 490, 289 N.Y.S.2d 161, 236 N.E.2d 451 (1968).
Precisely what minimum procedures are due under a statutory right to comply with the Due Process Clause depends on the circumstances of a particular situation. Marincas v. Lewis, 92 F.3d 195 (3d Cir. 1996).

9 McKenzie v. City of Chicago, 118 F.3d 552 (7th Cir. 1997).

10 State v. Gee, 73 Ariz. 47, 236 P.2d 1029 (1951); Winter v. Barrett, 352 Ill. 441, 186 N.E. 113, 89 A.L.R. 1398 (1933).

11 Kinsella v. U.S. ex rel. Singleton, 361 U.S. 234, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960).

12 State ex rel. Barancik v. Gates, 134 So. 2d 497 (Fla. 1961).

13 Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).

16B Am. Jur. 2d Constitutional Law § 941

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 941. Purpose and effect of Due Process Clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840, 3865

The Due Process Clause has as its purposes the ensuring of a fair and orderly administration of the laws[1] and the protecting of people against having the government impose burdens upon them except in accordance with the valid laws of the land.[2]

The due-process provisions of the Federal and State Constitutions afford protection against arbitrary and unreasonable governmental actions.[3] A claim that state legislation is arbitrary or irrational, or that the legislative process is defective, can support a denial of due-process claim.[4] The clause forbids the state itself to deprive an individual of his or her life, liberty, or property without due process of law, but its language cannot be fairly extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.[5]

The Due Process Clause is intended to prevent the government from abusing its power or employing it as an instrument of oppression.[6] Due process is not an end in itself; instead, its constitutional purpose is to protect a substantive interest to which an individual has a legitimate claim of entitlement.[7] Another purpose of the Due Process Clause is to protect the people from the state but not to ensure that the state protects them from each other.[8]

Caution:

The mere receipt of a benefit from the government does not automatically create an entitlement to that benefit for purposes of a due-process deprivation claim.[9]

The Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,[10] and simple, state-law contractual rights, without more, are likewise not worthy of substantive due-process protection.[11] This is so because substantive due-process rights are created only by the United States Constitution; state law-based rights, such as those provided by tort or contract law, constitutionally may be rescinded so long as the elements of procedural, not substantive, due process are observed.[12] On the other hand, property interests protected by due process are not created by the United States Constitution; instead, they are created, and their dimensions defined, by existing rules or understandings that stem from an independent source such as state law.[13]

Observation:

Due process is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security.[14]

Footnotes

1 International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945); Helicopter Transport Services, LLC v. Sikorsky Aircraft Corporation, 253 F. Supp. 3d 1115 (D. Or. 2017); Luberski, Inc. v. Oleificio F.LLI Amato S.R.L., 171 Cal. App. 4th 409, 89 Cal. Rptr. 3d 774 (4th Dist. 2009); McNally v. Morrison, 408 Ill. App. 3d 248, 351 Ill. Dec. 363, 951 N.E.2d 183 (1st Dist. 2011); Willbros USA, Inc. v. Certain Underwriters at Lloyds of London, 2009 OK CIV APP 90, 220 P.3d 1166 (Div. 2 2009).

2 Giaccio v. State of Pa., 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966); Patel v. Karnavati America, LLC, 437 N.J. Super. 415, 99 A.3d 836 (App. Div. 2014).

3 § 958.

4 Rea v. Matteucci, 121 F.3d 483 (9th Cir. 1997).

5 DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

6 General Motors Corp. v. Romein, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).
The purpose of the Bill of Rights in general, and the Due Process Clause of the 14th Amendment in particular, is to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974).

7 Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983); Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995).

8 DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

9 Morley's Auto Body, Inc. v. Hunter, 70 F.3d 1209 (11th Cir. 1995); Cleveland Constr., Inc. v. Cincinnati, 118 Ohio St. 3d 283, 2008-Ohio-2337, 888 N.E.2d 1068 (2008).

10 General Motors Corp. v. Romein, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992); Lucas v. U.S., 807 F.2d 414 (5th Cir. 1986).
Although substantive due-process protection has been extended to certain rights not enumerated in the Bill of Rights,

tort law and contract law remain largely outside the scope of substantive due-process jurisprudence. Local 342, Long Island Public Service Employees, UMD, ILA, AFL-CIO v. Town Bd. of Town of Huntington, 31 F.3d 1191 (2d Cir. 1994) (contracts); Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995) (torts).

[11] Local 342, Long Island Public Service Employees, UMD, ILA, AFL-CIO v. Town Bd. of Town of Huntington, 31 F.3d 1191 (2d Cir. 1994).

[12] McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); Ferencz v. Hairston, 119 F.3d 1244, 1997 FED App. 0221P (6th Cir. 1997); Mancuso v. Massachusetts Interscholastic Athletic Ass'n, Inc., 453 Mass. 116, 900 N.E.2d 518, 241 Ed. Law Rep. 311 (2009).
State law may bear upon a claim under the Due Process Clause when property interests protected by the 14th Amendment are created by state law. Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

[14] Collins v. City of Harker Heights, Tex., 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); Carlton v. Cleburne County, Ark., 93 F.3d 505 (8th Cir. 1996).
As to interference with property rights by exercise of the police power, generally, see §§ 383 to 388.
As to fundamental rights with respect to property, see §§ 628 to 647.

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16B Am. Jur. 2d Constitutional Law § 942

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 942. Construction and application of “due process of law”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Constitutional Law 3840, 3865

The provisions embodying the due-process guarantee have received a very broad and liberal interpretation.[1] The phrase “due process of law” formulates a concept less rigid and more fluid than those envisioned in other specific and particular provisions of the Bill of Rights, its application is less a matter of rule, and an asserted denial of it is to be tested by an appraisal of the totality of facts in a given case.[2] However, the vague contours of due process do not leave judges at large to do as they will, and they may not draw on their merely personal and private notions and disregard the limits that bind them in their judicial functions.[3] Moreover, the Due Process Clause of the 14th Amendment does not enact the economic theories of a particular era.[4] In each case, “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, and on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.[5]

While the fact that a right is specifically dealt with in another part of the United States Constitution may be indicative that it is not embraced within the Due Process Clause of the 14th Amendment,[6] such a rule is merely an aid to construction and must yield to more compelling considerations whenever such considerations exist, as where the right is of such a character that it cannot be denied without violating fundamental principles of liberty and justice.[7] In resolving conflicting claims concerning the meaning of the Due Process Clause of the 14th Amendment, the United States Supreme Court has looked increasingly to the Bill of Rights for guidance.[8]

The protection extends to rights in the broadest sense of the term. It conveys neither formal nor fixed nor narrow requirements; instead, it is the compendious expression for all those rights which the courts must enforce because they are basic to our free society.[9] In determining whether the requirement has been observed, regard must be had to substance rather than to form.[10] The protection afforded by the 14th Amendment against any state deprivation of liberty and property which

does not meet the standards of due process is not to be avoided by the simple label a state chooses to fasten upon its conduct or its statute.[11]

Decisions under the Due Process Clause require a close and perceptive inquiry into the fundamental principles of our society.[12] The guarantee is inapplicable where there is no interference with life, liberty, or a vested property right.[13] Decisions of the United States Supreme Court concerning the application of the Due Process Clause reveal the necessary process of balancing relevant and conflicting factors in the judicial application of that clause.[14]

Many state constitutions also contain provisions guaranteeing due process for their citizens. Although a state court may, in construing its state's guarantee of due process, look for guidance and inspiration to constructions of the Federal Due Process Clause by federal courts, final conclusions on how a state due-process guarantee found in a state constitution should be construed are for the state court to draw.[15]

Footnotes

1 Betts v. Easley, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).

2 Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) (overruled on other grounds by, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963)).

3 Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

4 Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966).

5 Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

6 Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (finding that the scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Constitution).

7 Powell v. State of Ala., 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932).

8 Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

9 Wolf v. People of the State of Colo., 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (overruled on other grounds by, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961)).

10 Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915); People v. Collins, 220 Cal. App. 2d 563, 33 Cal. Rptr. 638 (2d Dist. 1963).
Due-process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties. Market St. Ry. Co. v. Railroad Commission of State of Cal., 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).

11 Giaccio v. State of Pa., 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966); Pannell v. Jones, 36 N.Y.2d 339, 368 N.Y.S.2d 467, 329 N.E.2d 159 (1975).

12 Bartkus v. People of State of Ill., 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959).

13 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); State v. Robinson, 873 So. 2d 1205 (Fla. 2004); Senior Citizens League v. Department of Social Sec. of Wash., 38 Wash. 2d 142, 228 P.2d 478 (1951).
Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment, but those based only on economic and political predictions, not property rights, are not protected. U.S. v. 42.13 Acres of Land, 73 F.3d 953 (9th Cir. 1996).

14 Bartkus v. People of State of Ill., 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959).

15 RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272 (7th Cir. 1997); Putensen v. Hawkeye Bank of Clay County, 564 N.W.2d 404 (Iowa 1997).

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16B Am. Jur. 2d Constitutional Law § 943

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 943. Synonymity of “due process” and “law of the land”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Constitutional Law 3840, 3842, 3846, 3847

The term “due process of law” as used in the United States Constitution has been repeatedly declared to be the exact equivalent of the phrase “law of the land,”[1] as used in the Magna Carta,[2] and in some state constitutions.[3] The law of the land means the law of the state in which the proceeding is brought. The prohibition of the Federal Constitution against denial of due process does not mean that a state must observe the due process of law of some other jurisdiction over which it has no control.[4]

Footnotes

1 Motor Equipment Co. v. Winters, 146 Kan. 127, 69 P.2d 23 (1937); Jordan v. Gaines, 136 Me. 291, 8 A.2d 585 (1939); Appeal of Nguyen, 170 N.H. 238, 168 A.3d 1153 (2017); Patmore v. Town of Chapel Hill North Carolina, 233 N.C. App. 133, 757 S.E.2d 302 (2014); State v. McClintick, 23 Ohio Misc. 194, 51 Ohio Op. 2d 298, 52 Ohio Op. 2d 188, 255 N.E.2d 885 (C.P. 1970); Com. v. Rose, 2013 PA Super 305, 81 A.3d 123 (2013), order aff’d, 633 Pa. 659, 127 A.3d 794 (2015).

2 Wichita Council No. 120 of Security Ben. Ass’n v. Security Ben. Ass’n, 138 Kan. 841, 28 P.2d 976, 94 A.L.R. 629 (1934); Ex parte Sizemore, 110 Tex. Crim. 232, 8 S.W.2d 134, 59 A.L.R. 430 (1928).

3 Anne Arundel County Com’rs v. English, 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842 (1943) (overruled on other grounds by, Weaver v. Prince George’s County, 281 Md. 349, 379 A.2d 399 (1977)).
The “law of the land” guaranteed by the North Carolina Constitution is synonymous with “due process of law.” State v. Hales, 256 N.C. 27, 122 S.E.2d 768, 90 A.L.R.2d 804 (1961).

[4] In re McKee, 19 Utah 231, 57 P. 23 (1899).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

1. Background

§ 944. Differing protections of procedural and substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867, 3892 to 3896

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Construction and Application of Parratt-Hudson Doctrine, Providing That Where Deprivation of Property Interest Is Occasioned by Random and Unauthorized Conduct of State Officials, Procedural Due Process Inquiry Is Limited to Issue of Adequacy of Postdeprivation Remedies Provided by State, 89 A.L.R.6th 1

Trial Strategy

Proof of Unconstitutional Prison Conditions, 24 Am. Jur. Proof of Facts 3d 467

In its present stage of development, the concept of due process of law has a dual aspect, substantive[1] and procedural,[2] for the Due Process Clause of the 14th Amendment not only accords procedural safeguards to protected interests but likewise protects the substantive aspects of liberty against impermissible governmental restrictions.[3] The procedural and substantive components of the Due Process Clause are distinct from each other because each has different objectives, and each imposes different constitutional limitations on government power.[4] Procedural due-process guarantees that a state proceeding which

results in a deprivation of property is fair while substantive due process insures that such state action is not arbitrary and capricious.[5] Substantive due process includes both the protections of most of the Bill of Rights, as incorporated through the 14th Amendment, and also the more general protection against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.[6] Substantive due process is far narrower in scope than procedural due process.[7]

The guarantees of procedural and substantive due process, considered together, have been well summed up as follows: a minimum requirement of due process, allowing for variations in method, is always that a procedure be afforded under which the person whose property is to be taken will be allowed to be heard; that the determination under which he or she is required to surrender the property be reasonable; and that the determination be free from the opportunity for arbitrary power.[8] The Supreme Court has also noted that a wise public policy may require that higher standards be adopted than those minimally tolerable under the United States Constitution.[9]

The process due depends in large part on circumstances, as cases distinguish sharply between deprivations caused by the random, unauthorized conduct of state officials and deprivations caused by conduct pursuant to an established state procedure; for the former, the state is not automatically liable, but in the latter case, there may be liability where state policy approves or directs the conduct but falls below constitutional standards.[10]

Neither substantive not procedural due process is implicated by a state official's negligent act causing unintended loss of, or injury to, life, liberty, or property since a mere lack of due care by a state official does not "deprive" an individual of life, liberty, or property under the 14th Amendment.[11]

Footnotes

1 §§ 954 to 964.

2 §§ 945 to 953.

3 Harrah Independent School Dist. v. Martin, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979).

4 Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).

5 Licari v. Ferruzzi, 22 F.3d 344, 28 Fed. R. Serv. 3d 1472 (1st Cir. 1994); State v. Germane, 971 A.2d 555 (R.I. 2009). Procedural due-process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due-process review, that action is implemented in a fair manner. State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998).

6 DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F.3d 956 (11th Cir. 1997); Penterman v. Wisconsin Elec. Power Co., 211 Wis. 2d 458, 565 N.W.2d 521 (1997).

7 Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

8 Noyes v. Erie & Wyoming Farmers Co-op. Corp., 170 Misc. 42, 10 N.Y.S.2d 114 (Sup 1939), judgment rev'd on other grounds, 281 N.Y. 187, 22 N.E.2d 334 (1939).

9 Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

10 Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23 (1st Cir. 1996).

11 Davidson v. Cannon, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986).

Works.

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 945. What procedural process is due, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867

Procedural due process is a guarantee of fair procedure.[1] While due process of law, in its procedural aspect, has never been a term of fixed and invariable content,[2] the essential elements of procedural due process of law are notice and the opportunity to be heard prior to depriving a person of his or her protected property interest.[3] Thus, procedural due process makes it necessary that where one may be deprived of such a right, the person must be given notice of the proceedings against him or her;[4] the person must be given an opportunity to defend himself or herself, that is, a hearing,[5] before an impartial tribunal having jurisdiction of the cause;[6] and the problem of the propriety of the deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness.[7] The determination of the appropriate form of procedural protection required under the Due Process Clause requires an evaluation of all the circumstances and an accommodation of competing interests, in which an individual's right to fairness must be respected, as must a court's need to act quickly and decisively.[8]

The Due Process Clause calls for two separate inquiries in evaluating an alleged procedural due-process violation: has the plaintiff lost something that fits into one of the three protected categories of life, liberty, or property; and, if so, has the plaintiff received the minimum measure of procedural protection warranted under the circumstances.[9] As otherwise stated, the standard analysis under the Due Process Clause proceeds in two steps: (1) the court first asks whether there exists a liberty or property interest of which a person has been deprived, and (2) if so, it asks whether the procedures followed by the State were constitutionally sufficient.[10] Interests comprehended within the meaning of either "liberty" or "property" for these purposes include interests that are recognized and protected by state law and interests guaranteed in one of the provisions of the Bill of Rights which have been incorporated into the 14th Amendment.[11] A violation of procedural due process may occur even where the damages are only nominal.[12] In fact, for purposes of procedural due process, a damage remedy is not an

essential component of constitutionally adequate review procedures.[13]

The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one will be personally bound until he or she has had a day in court by which is meant until he or she has been duly cited to appear and has been afforded an opportunity to be heard.[14] Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered.[15]

Although the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.[16] Further, an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the 14th Amendment if a meaningful postdeprivation remedy for the loss is available.[17]

Footnotes

1 Cotnoir v. University of Maine Systems, 35 F.3d 6, 94 Ed. Law Rep. 104 (1st Cir. 1994); Wolf v. Fauquier County Bd. of Supervisors, 555 F.3d 311 (4th Cir. 2009); L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202 (R.I. 1997).

2 Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).
As to due process as flexible and calling for such procedural protections as the particular situation demands, see § 939.

3 Wolf v. Fauquier County Bd. of Supervisors, 555 F.3d 311 (4th Cir. 2009); Ardito v. City of Providence, 263 F. Supp. 2d 358 (D.R.I. 2003); Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461, 924 N.W.2d 594 (Minn. 2019); Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee, 2014-NMSC-006, 319 P.3d 639 (N.M. 2014); Nassau County Sheriff's Correction Officers Benevolent Ass'n, Inc. v. Nassau County, 137 A.D.3d 1145, 28 N.Y.S.3d 377 (2d Dep't 2016); OSI Restaurant Partners, LLC v. Oscoda Plastics, Inc., 831 S.E.2d 386 (N.C. Ct. App. 2019).
Sometimes, nothing more is required by due process before the government deprives a person of property than notice and the opportunity to be heard as to why the proposed action should or should not be taken. Gill v. N.J. Dept. of Banking and Ins., 404 N.J. Super. 1, 960 A.2d 397 (App. Div. 2008).

4 §§ 973 to 986.

5 §§ 987 to 1017.

6 §§ 1009 to 1015.

7 Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960) (holding that due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings); Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944); In re Cole C., 174 Cal. App. 4th 900, 95 Cal. Rptr. 3d 62 (4th Dist. 2009); Helfrick v. Dahlstrom Metallic Door Co., 256 N.Y. 199, 176 N.E. 141 (1931), judgment aff'd, 284 U.S. 594, 52 S. Ct. 202, 76 L. Ed. 511 (1932).
Even if government action depriving a person of life, liberty, or property survives a substantive due-process scrutiny, "procedural" due process requires that such government action be implemented in a fair manner. U.S. v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

8 Rogal v. American Broadcasting Companies, Inc., 74 F.3d 40, 34 Fed. R. Serv. 3d 388 (3d Cir. 1996).

9 Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995); Mallette v. Arlington County Employees' Supplemental Retirement System II, 91 F.3d 630 (4th Cir. 1996); Humphries v. County of Los Angeles, 554 F.3d 1170 (9th Cir. 2009), as amended, (Jan. 30, 2009) and rev'd and remanded on other grounds, 562 U.S. 29, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010); Farthing v. City of Shawnee, Kan., 39 F.3d 1131 (10th Cir. 1994).
To succeed on a claim of procedural due-process deprivation, that is, a lack of notice and opportunity to be heard, a

plaintiff must establish that some state action deprived him or her of a protected property interest. Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997).

10 Swarthout v. Cooke, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011); Victory v. Pataki, 814 F.3d 47 (2d Cir. 2016), for additional opinion, see, 632 Fed. Appx. 41 (2d Cir. 2016) and as amended, (Feb. 24, 2016); Dufur v. U.S. Parole Commission, 314 F. Supp. 3d 10 (D.D.C. 2018); Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018), aff'd, 937 F.3d 525 (5th Cir. 2019); Pimentel v. City of Methuen, 323 F. Supp. 3d 255 (D. Mass. 2018).

11 Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (finding that the statute which creates a right of action against a person who, under color of state law, subjects another to the deprivation of any right secured by the United States Constitution makes a deprivation of such latter type of right actionable independently of state law; construing 42 U.S.C.A. § 1983).

12 Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).

13 Licari v. Ferruzzi, 22 F.3d 344, 28 Fed. R. Serv. 3d 1472 (1st Cir. 1994).

14 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).

15 Powell v. State of Ala., 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932); Frahn v. Greyling Realization Corporation, 239 Ala. 580, 195 So. 758 (1940); Rediker v. Rediker, 35 Cal. 2d 796, 221 P.2d 1, 20 A.L.R.2d 1152 (1950); City of Coral Gables v. Certain Lands Upon Which Taxes Are Delinquent, 110 Fla. 189, 149 So. 36 (1933); Wichita Council No. 120 of Security Ben. Ass'n v. Security Ben. Ass'n, 138 Kan. 841, 28 P.2d 976, 94 A.L.R. 629 (1934); Brewer v. Valk, 204 N.C. 186, 167 S.E. 638, 87 A.L.R. 237 (1933); Simpson v. Stanton, 119 W. Va. 235, 193 S.E. 64 (1937).

16 § 963.

17 Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

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16B Am. Jur. 2d Constitutional Law § 946

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 946. Effect of past practices on procedural protections afforded by due-process guarantee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867

Ultimately, federal law prescribes the nature and extent of the procedural protections afforded by the United States Constitution.[1] It is certainly true, however, that if the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a federal court will interfere on the ground that there has been a failure of due process.[2]

Procedural due-process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.[3] Due process is primarily that kind of procedure which is suitable and proper to the nature of the case and sanctioned by established customs and usages.[4] It is not necessary that procedure conform to past usage, however, and new methods may be adopted or provided so long as they are in harmony with the underlying principles of the constitutional guarantee.[5] Any legal proceeding sanctioned by age and custom, or newly devised in the discretion of the legislative power for the furtherance of the general public good, which regards and preserves the fundamental rights of property and justice constitutes due process of law.[6]

Footnotes

1 Watson v. City of New York, 92 F.3d 31 (2d Cir. 1996).

2 Jordan v. Com. of Massachusetts, 225 U.S. 167, 32 S. Ct. 651, 56 L. Ed. 1038 (1912).

There is a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insured the protection of the interest of absent parties who are to be bound by it. Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

[3] § 952.

[4] Sherer v. City of Laguna Beach, 13 Cal. App. 2d 396, 57 P.2d 157 (4th Dist. 1936); Vogel v. Corporation Commission of Oklahoma, 1942 OK 14, 190 Okla. 156, 121 P.2d 586 (1942).

[5] People v. Troche, 206 Cal. 35, 273 P. 767 (1928) (overruled in part on other grounds by, People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949)).
In comparison with other constitutional claims such as equal protection or free exercise, a cognizable procedural due-process claim does not typically arise until proceedings are at a mature stage and due process has not been furnished even though some tangible deprivation has occurred. Sherwin Manor Nursing Center, Inc. v. McAuliffe, 37 F.3d 1216 (7th Cir. 1994).

[6] People v. Hickman, 204 Cal. 470, 268 P. 909 (1928).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 947. Factors considered and tests applied in determining whether procedural due-process requirements satisfied

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867, 3875

The requirements of due process frequently vary with the type of proceeding involved.[1] Procedural due process in the administrative setting, for instance, does not always require application of the judicial model.[2] Due process is flexible and calls for such procedural protections as the particular situation demands,[3] and the quantum and quality of the process due in a particular situation depends on the need to serve the due-process function of minimizing the risk of error in decision making.[4]

Procedural due-process claims require a two-part analysis: (1) whether the plaintiff has a liberty or property interest that is entitled to procedural due-process protection, and (2) if so, what process is due.[5] In asserting a procedural due-process violation, therefore, a plaintiff must first demonstrate that he or she has a protected property or liberty interest.[6] The analysis of a procedural due-process claim must thus begin with an examination of the interest allegedly violated.[7]

To determine what process is constitutionally due, the courts generally have balanced three distinct factors: (1) the private interest that will be affected by official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest,[8] including the fiscal and administrative burdens that any additional or substitute procedures would entail.[9] In at least one jurisdiction, consideration is also given to the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.[10] Thus, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[11]

Footnotes

[1] Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).
Constitutional procedural safeguards in the juvenile context find their genesis in the Due Process Clause of the 14th Amendment. State v. D.H., 120 Ohio St. 3d 540, 2009-Ohio-9, 901 N.E.2d 209 (2009).

[2] Dixon v. Love, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977).
As to procedural due process in administrative proceedings, generally, see Am. Jur. 2d, Administrative Law §§ 53, 117.

[3] § 939.

[4] Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Mallette v. Arlington County Employees' Supplemental Retirement System II, 91 F.3d 630 (4th Cir. 1996).

[5] Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995); Joelson v. U.S., 86 F.3d 1413, 1996 FED App. 0178P (6th Cir. 1996); Hamlin v. Vaudenberg, 95 F.3d 580 (7th Cir. 1996); Watson v. University of Utah Medical Center, 75 F.3d 569, 106 Ed. Law Rep. 1030 (10th Cir. 1996); Branham v. May, 428 F. Supp. 2d 668, 210 Ed. Law Rep. 173 (E.D. Ky. 2006); Bluitt v. Houston Independent School Dist., 236 F. Supp. 2d 703 (S.D. Tex. 2002).

[6] Davenport v. University of Arkansas Bd. of Trustees, 553 F.3d 1110 (8th Cir. 2009); Watson v. University of Utah Medical Center, 75 F.3d 569, 106 Ed. Law Rep. 1030 (10th Cir. 1996); Rivera v. Fagundo, 301 F. Supp. 2d 103 (D.P.R. 2004), aff'd, 414 F.3d 124 (1st Cir. 2005); Hines v. Fabian, 764 N.W.2d 849 (Minn. Ct. App. 2009); Beasley v. Flathead County, 2009 MT 121, 350 Mont. 177, 206 P.3d 915 (2009).
In assessing a procedural due-process claim unless there has been a deprivation of a protected liberty or property interest by state action, the question of what process is required is irrelevant for the constitutional right to due process is simply not implicated. Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson, 566 F.3d 138, 244 Ed. Law Rep. 549 (4th Cir. 2009).

[7] Dover Elevator Co. v. Arkansas State University, 64 F.3d 442, 103 Ed. Law Rep. 49 (8th Cir. 1995).

[8] Nelson v. Colorado, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017); Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); Reams v. Irvin, 561 F.3d 1258 (11th Cir. 2009); Atherton v. District of Columbia Office of Mayor, 567 F.3d 672 (D.C. Cir. 2009); Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors, 205 P.3d 326 (Alaska 2009); In re William M.W., 43 Cal. App. 5th 573, 256 Cal. Rptr. 3d 740 (1st Dist. 2019); In re Jayce O., 323 Conn. 690, 150 A.3d 640 (2016); School Bd. of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009); State v. Russell, 897 N.W.2d 717 (Iowa 2017); Interest of J.L., 57 Kan. App. 2d 60, 449 P.3d 762 (2019); Costa v. Fall River Housing Authority, 453 Mass. 614, 903 N.E.2d 1098 (2009); In re Adoption of N.F., 2019-Ohio-5380, 2019 WL 7290484 (Ohio Ct. App. 3d Dist. Logan County 2019); City of Philadelphia v. Shih Tai Pien, 224 A.3d 71 (Pa. Commw. Ct. 2019); Interest of T.B., 594 S.W.3d 773 (Tex. App. Waco 2019); Stone v. Town of Irasburg, 196 Vt. 356, 2014 VT 43, 98 A.3d 769 (2014); In re Lain, 179 Wash. 2d 1, 315 P.3d 455 (2013).

[9] Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); In re William M.W., 43 Cal. App. 5th 573, 256 Cal. Rptr. 3d 740 (1st Dist. 2019); In re Jayce O., 323 Conn. 690, 150 A.3d 640 (2016); Interest of J.L., 57 Kan. App. 2d 60, 449 P.3d 762 (2019); City of Philadelphia v. Shih Tai Pien, 224 A.3d 71 (Pa. Commw. Ct. 2019); Interest of T.B., 594 S.W.3d 773 (Tex. App. Waco 2019); Stone v. Town of Irasburg, 196 Vt. 356, 2014 VT 43, 98 A.3d 769 (2014); In re Lain, 179 Wash. 2d 1, 315 P.3d 455 (2013).

[10] In re William M.W., 43 Cal. App. 5th 573, 256 Cal. Rptr. 3d 740 (1st Dist. 2019).

[11] Fusari v. Steinberg, 419 U.S. 379, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975); Pannell v. Jones, 36 N.Y.2d 339, 368 N.Y.S.2d 467, 329 N.E.2d 159 (1975).
When the Due Process Clause is invoked in a novel context, a court must begin its inquiry with a determination of the precise nature of the private interest that is threatened by the state, and only after that interest has been identified can

the court properly evaluate the adequacy of the state's process. Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

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16B Am. Jur. 2d Constitutional Law § 948

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Constitutional Law
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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

a. What Procedural Process Is Due

§ 948. Fundamental requirements of procedural due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867 to 3879

A.L.R. Library

Application of Stigma-Plus Due Process Claims to Education Context, 41 A.L.R.6th 391

The core of due process is the right to notice and a meaningful opportunity to be heard.[1] More specifically, the fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.[2] Exceptions to the principle that a person must be afforded notice and an opportunity for a hearing before he or she is deprived of his or her rights can be justified only in extraordinary circumstances.[3] Thus, except in extraordinary situations in which some valid governmental interest is at stake that justifies postponing a hearing until after the event, the government must provide a hearing before depriving an individual of a protected interest.[4]

Reminder:

The standard analysis under the Due Process Clause proceeds in two steps: (1) the court first asks whether there exists a liberty or

property interest of which a person has been deprived, and (2) if so, it asks whether the procedures followed by the State were constitutionally sufficient.[5]

Whether the United States Constitution requires that a particular right obtain in a specific proceeding depends on a complexity of factors such as the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding.[6] Due process is required only when a decision of the state implicates an interest within the protection of the 14th Amendment, and to determine whether due-process requirements apply in the first place, the court must look not to the weight but to the nature of the interest at stake.[7]

Observation:

To have a constitutionally protected interest sufficient to be entitled to due process, the plaintiff must have more than an abstract need and must have a legitimate claim of entitlement that is defined by an existing rule or understanding that stems from some independent source such as state law.[8] Thus, a person clearly must have more than an abstract need for a protectable right and more than a unilateral expectation of it; instead, he or she must have a legitimate claim of entitlement to it.[9]

Before the United States Supreme Court invokes the Constitution to impose a due-process procedural requirement, it should be reasonably certain that the effect will be to afford protection appropriate to the constitutional interests at stake.[10] Both the degree of potential deprivation of a benefit or interest that may be created by a particular decision and the possible length of wrongful deprivation are factors to be considered in assessing the validity of any governmental decision-making process for purposes of due process.[11] Moreover, in order to fully assess the reliability and fairness of a system of a governmental procedure governing the termination of benefits for purposes of its compliance with due process, consideration must be given not only to the reversal rate for appealed cases but also to the overall rate of error for all denials of benefits.[12]

On the other hand, although the United States Supreme Court eschews rigid or formalistic limitations on the protection of procedural due process, it nevertheless observes certain boundaries for the words “liberty” and “property” in the Due Process Clause of the 14th Amendment must be given some meaning.[13] The Due Process Clause of the 14th Amendment requires that state action not transgress those fundamental notions upon which all our civil and political institutions are based.[14]

Observation:

The rationale for granting procedural protection to an interest that does not rise to the level of a fundamental right is the prevention of arbitrary use of government power. Procedural due-process claims do not implicate the egregiousness of the action itself but only question whether the process accorded prior to the deprivation has been constitutionally sufficient. Although the existence of a protected right must be the threshold determination, the focus of the inquiry centers on the process provided rather than on the nature of the right.[15]

Footnotes

1 LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998).
Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before a governmental deprivation of a property interest. Ito v. Investors Equity Life Holding Co., 135 Haw. 49, 346 P.3d 118 (2015).

2 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); Sheffey v. Futch, 250 So. 2d 907 (Fla. 4th DCA 1971); State v. Harkins, 786 N.W.2d 498 (Iowa Ct. App. 2009); Gams v. Houghton, 884 N.W.2d 611 (Minn. 2016); Rumora v. Board of Ed. of Ashtabula Area City School Dist., 32 Ohio Misc. 165, 61 Ohio Op. 2d 289, 290 N.E.2d 195 (C.P. 1972); City of South Milwaukee v. Kester, 2013 WI App 50, 347 Wis. 2d 334, 830 N.W.2d 710 (Ct. App. 2013).

3 Randone v. Appellate Department, 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971) (ruling that a creditor's private interest is never sufficient to justify attachment of his alleged debtor's necessities of life before notice and a hearing on the validity of the creditor's claim even where there is a likelihood that the alleged debtor may abscond or conceal assets).
Temporary or partial impairments to property rights entailed by attachments, liens, and similar encumbrances are sufficient to merit due-process protection even though they do not amount to any complete, physical, or permanent deprivation of real property. Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).
However, homeowners were not deprived of their property rights without due process by attachment of their homes by a home repair contractor pursuant to Connecticut's prejudgment attachment statute which did not require a predeprivation hearing or the posting of a security bond. Shaumyan v. O'Neill, 987 F.2d 122 (2d Cir. 1993).
As to instances when notice is not required, see §§ 985, 986.
As to proceedings in which a hearing is not required, see §§ 995, 996.

4 U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993); James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996).

5 § 945.

6 Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).
The process due at any given time must reflect the nature of the proceeding and the interests involved. KC v. State, 2015 WY 73, 351 P.3d 236 (Wyo. 2015).

7 Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); State v. Small, 162 Ohio App. 3d 375, 2005-Ohio-3813, 833 N.E.2d 774 (10th Dist. Franklin County 2005), cause dismissed, 106 Ohio St. 3d 1476, 2005-Ohio-4054, 832 N.E.2d 731 (2005).
The requirements of procedural due process are applicable where a state attaches a badge of infamy to a citizen. Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971).
A driver's license is an important interest entitled to the protection of procedural due process of law. Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); State v. Perry, 96 Wash. App. 1, 975 P.2d 6 (Div. 1 1999).

8 Davila-Lopes v. Zapata, 111 F.3d 192 (1st Cir. 1997).

9 Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Hill v. Jackson, 64 F.3d 163 (4th Cir. 1995); Potts v. Davis County, 551 F.3d 1188 (10th Cir. 2009); Stewart v. Gaines, 370 F. Supp. 2d 293 (D.D.C. 2005); Cleveland Constr., Inc. v. Cincinnati, 118 Ohio St. 3d 283, 2008-Ohio-2337, 888 N.E.2d 1068 (2008).

10 Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

11 Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Educ. of the District of Columbia, 109 F.3d 774, 117 Ed. Law Rep. 42 (D.C. Cir. 1997).
In determining what process is due, an account must be taken of the length and finality of the deprivation. Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
The duration of any potentially wrongful deprivation of a property interest under a state's procedures is an important

factor in assessing the impact of official action on the private interest involved for purposes of determining the process due under the Due Process Clause of the 14th Amendment. Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).

12 Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

13 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

14 Weaver v. Brenner, 40 F.3d 527 (2d Cir. 1994).

15 Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 949. What is not required for procedural due process, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867, 3912

Procedural due process, unlike its substantive counterpart, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest. Instead, it simply requires that the government provide due process before making such a decision.[1] Procedural due process does not require perfection at every stage of a process,[2] and, unlike substantive due process, does not require that liability turn upon the culpability of the offending party.[3] Moreover, the Due Process Clause does not require a single model of procedural fairness, let alone a particular form of procedure,[4] and does not require a process that is afforded at the time and in the manner of one's own choosing.[5]

The applicability of procedural due-process rights is not governed by any wooden distinction between "rights" and "privileges,"[6] nor does it rest on any distinctions as to the "importance" or "necessity" of the property involved.[7] Furthermore, although the establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication, nevertheless the United States Constitution recognizes higher values than speed and efficiency.[8] Similarly, financial cost alone is not a controlling weight in determining whether procedural due process requires a particular procedural safeguard prior to some governmental decision, but the government's interest, and hence that of the public, in conserving scarce fiscal and governmental resources is a factor that must be weighed.[9]

At some point, the benefit of an additional safeguard to the individual affected and to society, in terms of increased assurance that the action is just, may be outweighed by the cost.[10] The range of interests protected by procedural due process is not infinite.[11] Thus, although determination of whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss,[12] not every grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the Due Process Clause of the 14th Amendment.[13]

Footnotes

[1] Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).

[2] Saucon Valley Manor, Inc. v. Miller, 392 F. Supp. 3d 554 (E.D. Pa. 2019).

[3] Sharp v. Becerra, 393 F. Supp. 3d 991 (E.D. Cal. 2019).

[4] Retfalvi v. United States, 335 F. Supp. 3d 791 (E.D. N.C. 2018), aff'd, 930 F.3d 600 (4th Cir. 2019).

[5] Sterigenics U.S., LLC v. Kim, 385 F. Supp. 3d 600 (N.D. Ill. 2019).

[6] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).
Failure of a state-code provision relating to the filing of an undertaking by a plaintiff in an action against a public entity or a public employee to satisfy due-process requirements cannot be justified under the theory that bringing such an action is a privilege rather than a right and, as such, not subject to due-process requirements. Beaudreau v. Superior Court, 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713 (1975).

[7] Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

[8] U. S. Dept. of Agriculture v. Murry, 413 U.S. 508, 93 S. Ct. 2832, 37 L. Ed. 2d 767 (1973); Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005 (C.D. Cal. 2011).
Procedural due process is not intended to promote efficiency or accommodate all possible interests; instead, it is intended to protect the particular interests of the person whose possessions are about to be taken. Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

[9] Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).
Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard. Bellevue School Dist. v. E.S., 148 Wash. App. 205, 199 P.3d 1010, 240 Ed. Law Rep. 925 (Div. 1 2009), rev'd on other grounds, 171 Wash. 2d 695, 257 P.3d 570, 269 Ed. Law Rep. 915 (2011).

[10] Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[11] Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
There is no fundamental due-process right to the continued opportunity to exonerate oneself throughout the natural course of one's life. U.S. v. Quinones, 313 F.3d 49 (2d Cir. 2002).

[12] Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); U.S. v. Silver, 83 F.3d 289 (9th Cir. 1996).

[13] Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).
That a precipitous and perhaps improvident decision to remove a child from his foster family might constitute a grievous loss to the foster family does not, in and of itself, implicate the due-process guarantee of the 14th Amendment as within the "liberty" protected thereby. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).
The procedural requirements of the Due Process Clause of the 14th Amendment are not brought into play merely because a government official defames a person. Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 950. Notice and hearing not required by procedural due-process guarantee when new legislation passed

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867, 3889 to 3891

Before due-process rights attach, a person must show that a deprivation occurred as a result of an adjudicatory process rather than a legislative process.[1] Due process requires a notice and hearing only in quasi-judicial or adjudicatory settings and not in the adoption of general legislation.[2] From the inception of this nation's legal system, statutes of general application have regularly been enacted without affording each potentially affected individual notice and hearing.[3]

Observation:

If a matter is one in which all are equally concerned, the matter is a legislative process and due-process rights do not attach.[4]

Footnotes

[1] Blocktree Properties, LLC v. Public Utility District No. 2 of Grant County Washington, 380 F. Supp. 3d 1102 (E.D. Wash. 2019), aff'd, 783 Fed. Appx. 769 (9th Cir. 2019).
Procedural due-process concerns are implicated only by adjudications, not by state actions that are legislative in character. O'Toole v. Pennsylvania Department of Corrections, 196 A.3d 260 (Pa. Commw. Ct. 2018).

[2] San Diego Bldg. Contractors Assn. v. City Council, 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P.2d 570, 72 A.L.R.3d 973 (1974) (disapproved of on other grounds by, Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979)).
Absent a constitutional or statutory right to a hearing, a party has no right to a hearing before an agency makes a legislative determination. Legislature of Rockland County v. New York State Public Service Commission, 49 A.D.2d 484, 375 N.Y.S.2d 650 (3d Dep't 1975).
The selection of a site for a public improvement is the exercise of power which is legislative in nature, and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable. Stones v. Plattsmouth Airport Authority, 193 Neb. 552, 228 N.W.2d 129 (1975).

[3] San Diego Bldg. Contractors Assn. v. City Council, 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P.2d 570, 72 A.L.R.3d 973 (1974) (disapproved of on other grounds by, Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979)).

[4] Blocktree Properties, LLC v. Public Utility District No. 2 of Grant County Washington, 380 F. Supp. 3d 1102 (E.D. Wash. 2019), aff'd, 783 Fed. Appx. 769 (9th Cir. 2019).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 951. Particular form of procedure not required by due-process guarantee; state power as to form

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867

The guarantee of due process, viewed in its procedural aspect, requires no particular form of procedure.[1] Due process does not require a state to adopt one procedure over another on the basis that the procedure may produce results more favorable to the party challenging the existing procedures.[2] Instead, due process requires only that certain safeguards exist in whatever procedural form it is afforded. The Due Process Clause in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided that the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided.[3] Thus, for example, the states are afforded great flexibility in satisfying the federal constitutional requirements of due process in the field of taxation, and as long as state law provides a clear and certain remedy, the states may determine whether to provide predeprivation process, such as an injunction, or instead to afford postdeprivation relief, such as a refund.[4] Also, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened, and in determining whether the Clause requires a right to counsel in such circumstances, a court must take account of opposing interests, as well as consider the probable value of additional or substitute procedural safeguards.[5]

The violation of a state's formal procedure does not in and of itself implicate constitutional due-process concerns.[6] Even though state law might command faithful adherence to the institution's mandatory rules, and a violation may result in some remedy or sanction, violating a procedural rule alone does not accomplish the creation of a protectable constitutional interest.[7] When a state provides a party with a notice and a hearing that comport with due-process standards, the state's failure to follow its own rules is not per se a deprivation of substantive due process.[8]

Observation:

The Due Process Clause of the 14th Amendment does not control mere forms of procedure in the state courts or regulate the practice therein.[9] The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.[10]

Nothing in the United States Constitution prevents a state from providing such a system of courts as it chooses.[11] A state does not violate the Due Process Clause of the 14th Amendment by providing alternative or additional procedures beyond what the Federal Constitution requires.[12]

From the foregoing, it follows that due process does not necessarily require judicial process[13] or trial by jury,[14] and even where a right to a jury trial is granted, there is nothing in the United States Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.[15]

Although due process has its roots in the traditions of the common law,[16] it is not to be inferred that all modes of procedure which do not have the sanction of this early law are to be condemned.[17] Furthermore, the Fifth Amendment itself guarantees no particular form of procedure; instead, it protects only substantial rights.[18]

Footnotes

1 Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 (1974); Geo S Bush & Co v. U S, 22 Cust. Ct. 158, 135 F. Supp. 696 (Cust. Ct. 1 Div. 1949); People v. Dean, 174 Cal. App. 4th 186, 94 Cal. Rptr. 3d 478 (4th Dist. 2009); In re Santillanes, 1943-NMSC-011, 47 N.M. 140, 138 P.2d 503 (1943); Commission of Investigation of State by Lane v. Lombardozzi, 7 A.D.2d 48, 180 N.Y.S.2d 496 (1st Dep't 1958), order aff'd, 5 N.Y.2d 1026, 185 N.Y.S.2d 550, 158 N.E.2d 250 (1959) and order aff'd, 6 N.Y.2d 744, 186 N.Y.S.2d 272, 158 N.E.2d 847 (1959); McMahan v. S.C. Department of Education-Transportation, 417 S.C. 481, 790 S.E.2d 393 (Ct. App. 2016).

2 Heller v. Doe by Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

3 Northeast Sav., F.A. v. Hintlian, 241 Conn. 269, 696 A.2d 315 (1997).

4 National Private Truck Council, Inc. v. Oklahoma Tax Com'n, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).

5 Turner v. Rogers, 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011).

6 Purisch v. Tennessee Technological University, 76 F.3d 1414, 1996 FED App. 0069P (6th Cir. 1996).

7 Davila-Lopes v. Zapata, 111 F.3d 192 (1st Cir. 1997).
The mere failure to accord procedural protections called for by state law or regulation does not of itself amount to a denial of due process. Giovanni v. Lynn, 48 F.3d 908 (5th Cir. 1995).

8 Levitt v. University of Texas at El Paso, 759 F.2d 1224, 24 Ed. Law Rep. 711 (5th Cir. 1985).

9 Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co., 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931); Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930).
The Federal Rules of Criminal Procedure have no application in state courts and cannot be incorporated into the 14th Amendment as a limitation on state action. People v. Kross, 112 Cal. App. 2d 602, 247 P.2d 44 (2d Dist. 1952).
The 14th Amendment does not compel state courts or legislatures to adopt any particular rule for establishing conclusiveness of judgments in class suits; there is a denial of due process only in those class suits where it cannot be said that the procedure adopted fairly insured protection of the interests of absent parties who are to be bound by it.

Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975).

10 Brown v. State of Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936); Winkler v. State, 194 Md. 1, 69 A.2d 674 (1949).

11 Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927); State v. Polakow's Realty Experts, 243 Ala. 441, 10 So. 2d 461 (1942).

12 Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

13 Ex parte Williams, 345 Mo. 1121, 139 S.W.2d 485 (1940).
As to the necessity of a judicial tribunal, see § 1010.

14 Am. Jur. 2d, Jury § 7.

15 Chicago, R.I. & P.R. Co. v. Cole, 251 U.S. 54, 40 S. Ct. 68, 64 L. Ed. 133 (1919).

16 §§ 934, 935.

17 Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956).

18 N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).
The process afforded by state law is not relevant in determining whether there is a state-created right that triggers due-process protection. Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997).
However, a state law which generates a legitimate claim of entitlement can create an interest, deprivation of which triggers application of the Due Process Clause. Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996), certified question answered on other grounds, 697 A.2d 23 (D.C. 1997).

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16B Am. Jur. 2d Constitutional Law § 952

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law
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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 952. Highest degree of fairness and wisdom not required by due-process guarantee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867

What state procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and history is relevant to these inquiries.[1] The very nature of the due-process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case,[2] but instead, procedural due-process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.[3] No particular procedure violates the 14th Amendment merely because another method may seem fairer or wiser.[4]

Accordingly, a state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of liberty or justice ranked as fundamental,[5] such as the requirements of notice and hearing[6] or unless it is unreasonable or arbitrary.[7] Thus, the protections of the Due Process Clause are invoked only when state procedures which may produce erroneous or unreliable results imperil a protected liberty or property interest.[8]

Observation:

The Due Process Clause does not use the words "due process" as an equivalent for the process of the federal courts.[9]

Footnotes

[1] Cohen v. Hurley, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961) (overruled in part on other grounds by, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)) and (overruled in part on other grounds by, Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967)).

[2] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); Yarbrough v. Decatur Housing Authority, 941 F.3d 1022 (11th Cir. 2019); Proctor v. McNeil, 14 F. Supp. 3d 1108, 310 Ed. Law Rep. 157 (N.D. Ill. 2014); Potomac Development Corp. v. District of Columbia, 28 A.3d 531 (D.C. 2011).

[3] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); Barkley v. U.S. Marshals Service ex rel. Hylton, 766 F.3d 25 (D.C. Cir. 2014); Community Youth Athletic Center v. City of National City, 220 Cal. App. 4th 1385, 164 Cal. Rptr. 3d 644 (4th Dist. 2013); Pagan v. Carey Wiping Materials Corp., 144 Conn. App. 413, 73 A.3d 784 (2013).

[4] Stein v. People of State of New York, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (overruled in part on other grounds by, Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964)); Ghost Player, L.L.C. v. State, 860 N.W.2d 323 (Iowa 2015).
Congress has absolutely no obligation to select a legislative scheme that a court would later find to be the fairest but need only choose one that is rational and not arbitrary; an appellate court does not sit in judgment on the wisdom of Congress's solution, only its rationality. Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996).

[5] Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
A jury fee required to be paid by any party claiming a jury of 12 in any civil action in state court does not violate due process as the right to a jury trial is not a fundamental right in civil actions. Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824 (1976).

[6] People's Wayne County Bank v. Wolverine Box Co., 250 Mich. 273, 230 N.W. 170, 69 A.L.R. 1024 (1930).
Due process and the Sixth Amendment guarantee a defendant summarily charged in a state court with contempt an opportunity to be heard in his or her defense and to be represented by counsel. Pounders v. Watson, 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997); Watson v. Block, 102 F.3d 433 (9th Cir. 1996), cert. granted, judgment rev'd on other grounds, 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997).

[7] Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co., 284 U.S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931); Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940); Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943).

[8] Johnson v. Rodriguez, 110 F.3d 299 (5th Cir. 1997).

[9] Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

2. Procedural Due Process

b. What Is Not Required for Procedural Due Process

§ 953. Effect of state law on procedural due-process determination

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3867, 3869

The Due Process Clause of the 14th Amendment does not make the statutes of the several states the test of what it requires.[1] A state-created right can, in some circumstances, beget yet other rights to procedures essential to a realization of the parent right; however, the underlying right must have come into existence before it can trigger due-process protection.[2]

While procedures in civil litigation long-sanctioned by the passage of time and widely used throughout the United States will generally satisfy the Supreme Court as being due proceedings at law or due process of law,[3] the fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process although it is plainly worth considering in determining whether the practice offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[4]

Footnotes

1 Hebert v. State of La., 272 U.S. 312, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102 (1926); Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940).

2 Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981); Foley v. Beshear, 462 S.W.3d 389 (Ky. 2015).

[3] Corn Exchange Bank v. Coler, 280 U.S. 218, 50 S. Ct. 94, 74 L. Ed. 378 (1930).
That there may be risks of error in a process does not require holding unconstitutional in terms of due process, an entire statutory and administrative scheme that is generally followed in more than three-fifths of the cases. Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

[4] Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 954. Purpose and history of substantive “due process”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Constitutional Law 3892 to 3906

A.L.R. Library

School’s Violation of Student’s Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235

Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1

Trial Strategy

Proof That School Board Improperly Expelled Student from School, 55 Am. Jur. Proof of Facts 3d 313

Arbitrary or Capricious Grading of Student, 19 Am. Jur. Proof of Facts 2d 649

Forms

Forms relating to readmission or expulsion of student, generally, see Am. Jur. Pleading and Practice Forms, Colleges and Universities [Westlaw®(r) Search Query]

Forms relating to admission, suspension or expulsion, and graduation, generally, see Am. Jur. Pleading and Practice Forms, Schools [Westlaw®(r) Search Query]

The principle of due process of law had its origin in England where it was a protection to individuals from arbitrary action by the Crown.[1] In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his or her rights, whether relating to his or her life, liberty, or property.[2] Due process of law has come since the end of the 19th century to be applied to the field of substantive rights in the form of the proposition that the legislature, as well as the judiciary, is forbidden to act arbitrarily in contravention of the fundamental principles of liberty and justice that lie at the base of all civil and political institutions of the United States.[3]

The doctrine of substantive due process is concerned with whether a particular state regulation of an individual interest is justified.[4] The basic test for determining whether an individual’s substantive due-process rights have been violated is whether the state can justify the infringement of its legislative activity upon his or her personal rights and liberties.[5] Hence, substantive due process bars certain government actions, regardless of the fairness of the procedures used to implement them.[6]

The doctrine of substantive due process has the two primary features of specially protecting those fundamental rights and liberties which are, objectively, deeply rooted in the nation’s history and tradition, and providing a careful description of some asserted fundamental liberty interest.[7] In determining whether a plaintiff’s asserted liberty interest is fundamental, the court must assess whether it is objectively, deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if the liberty interest at issue were sacrificed.[8]

Substantive due process under the Fifth Amendment is an expanded concept which is a limitation upon all the powers of Congress, even the war power.[9] Moreover, under the 14th Amendment, the right to substantive due process includes the right to be free from state and local government interference with certain constitutionally recognized fundamental rights.[10]

Observation:

No abstract right to substantive due process exists under the United States Constitution.[11] Such rights are created only by the United States Constitution, not by state laws.[12] Thus, substantive due-process rights are founded not upon state law but upon deeply rooted notions of fundamental personal interests derived from the United States Constitution.[13]

The substantive due-process doctrine does not authorize courts to expand constitutional clauses at will.[14] In fact, as a general matter, the Supreme Court is reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended.[15] Thus, a substantive due-process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires the Supreme Court to exercise the utmost care whenever it is asked to break new ground in such field.[16]

Cases:

While a State-created liberty interest may be entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment, a state-created liberty interest cannot form the basis of a substantive due process claim. U.S. Const. Amend. 14. Doe v. University of Nebraska, 451 F. Supp. 3d 1062 (D. Neb. 2020).

[END OF SUPPLEMENT]

Footnotes

[1] § 934.

[2] Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944); Railway Mail Ass'n v. Corsi, 293 N.Y. 315, 56 N.E.2d 721 (1944), judgment aff'd, 326 U.S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072 (1945); Uram v. Roach, 47 Wyo. 335, 37 P.2d 793, 95 A.L.R. 1448 (1934).
Under substantive due process, a statute is unconstitutional if it impermissibly restricts a person's life, liberty, or property interest. People v. Johnson, 225 Ill. 2d 573, 312 Ill. Dec. 350, 870 N.E.2d 415 (2007).
As to protection from arbitrary and capricious action, see § 958.

[3] Palko v. State of Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (overruled on other grounds by, Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).
The Due Process Clause of the 14th Amendment, like its Fifth Amendment counterpart, guarantees more than fair process; it also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[4] People v. Santiago, 51 A.D.2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975), order rev'd on other grounds, 40 N.Y.2d 990, 391 N.Y.S.2d 67, 359 N.E.2d 663 (1976).

[5] State v. Robinson, 873 So. 2d 1205 (Fla. 2004).

[6] Guertin v. State, 912 F.3d 907 (6th Cir. 2019), cert. denied, 140 S. Ct. 933, 205 L. Ed. 2d 522 (2020) and cert. denied, 140 S. Ct. 933, 205 L. Ed. 2d 522 (2020); Abdi v. Wray, 942 F.3d 1019 (10th Cir. 2019); Grasson v. Board of Educ. of Town of Orange, 24 F. Supp. 3d 136, 311 Ed. Law Rep. 244 (D. Conn. 2014); Cruz-Caraballo v. Rodriguez, 113 F. Supp. 3d 484 (D.P.R. 2014); State v. Robinson, 873 So. 2d 1205 (Fla. 2004); State v. Netland, 762 N.W.2d 202 (Minn. 2009); State v. Germane, 971 A.2d 555 (R.I. 2009); Swanson Hay Company v. State Employment Security Department, 1 Wash. App. 2d 174, 404 P.3d 517 (Div. 3 2017), review denied, 191 Wash. 2d 1004, 428 P.3d 124 (2018) and cert. denied, 139 S. Ct. 605, 202 L. Ed. 2d 430 (2018).

[7] Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).
History and tradition are the starting point but not in all cases the ending point of substantive due-process inquiry. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

[8] Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728 (2008).

[9] Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).
If the goals sought by federal legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment. Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

[10] Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997); Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995), as amended, (July 10, 1995); Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995).

[11] Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994).

[12] Wooten v. Campbell, 49 F.3d 696 (11th Cir. 1995).

[13] Nilson v. Layton City, 45 F.3d 369, 97 Ed. Law Rep. 139 (10th Cir. 1995).

[14] LeRoy v. Illinois Racing Bd., 39 F.3d 711 (7th Cir. 1994).

[15] Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).

[16] Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

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16B Am. Jur. 2d Constitutional Law § 955

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 955. Reasonableness, rationality, and relationship to object to comply with substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3895

A.L.R. Library

School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235

Validity of State Statutes, Regulations, or other Identification Requirements Restricting or Denying Driver's Licenses to Illegal Aliens, 16 A.L.R.6th 131

Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1

Where a statute neither interferes with a fundamental right nor singles out a suspect classification,[1] substantive due process demands no more than a reasonable fit between a governmental purpose and the means chosen to advance that purpose.[2] Under substantive due-process law analysis in such cases, therefore, due process may be characterized as a standard of reasonableness[3] which is synonymous with the reasonableness analysis of an equal protection claim.[4] In fact, the rational basis test is identical under the two rubrics of equal protection and due process.[5]

Accordingly, where fundamental rights or interests are not implicated or infringed, state statutes are reviewed under the rational basis test under which a statute withstands a substantive due-process challenge if the state identifies a legitimate state

interest that the legislature could rationally have concluded is served by the statute.[6] Under rational basis review for a violation of substantive due process, the test is whether the court can conceive of a rational basis for sustaining the legislation; the court need not have evidence that the legislature has actually acted upon that basis.[7] The test of whether legislation violates due process is whether, in enacting legislation, the legislature is acting in pursuit of permissible state objectives and, if so, whether the means adopted are reasonably related to accomplishment of those objectives.[8]

Observation:

The rational basis test is highly deferential;[9] its focus is not on the wisdom of the statute.[10] If there is any conceivable set of facts to show a rational basis for the statute, it will be upheld under the rational basis test.[11] Thus, when subjecting a state statute to a rational basis review on a substantive due-process claim, a court is not entitled to second-guess the legislature on the factual assumptions or policy considerations underlying the statute.[12]

The only substantive due-process inquiry permitted is whether the legislature rationally might have believed that the predicted reaction would occur or that the desired end would be served. It is up to the person challenging the statute to convince the court that the legislative facts on which the classification of the statute is apparently based could not reasonably be conceived as true by the governmental decision maker.[13] The true purpose of a governmental policy is irrelevant for a rational basis analysis under the Due Process Clause. The question is only whether a rational relationship exists between the policy and a conceivable legitimate governmental objective. If it is at least debatable whether a rational relationship exists between a governmental policy and a conceivable legitimate governmental objective, there is no substantive due-process violation.[14] Governmental action is rationally related to a legitimate goal, as required by substantive due process, unless the action is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare.[15]

Caution:

The fact that a legislative act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, and thus, subject to a facial substantive due-process challenge.[16]

Footnotes

1 § 956.

2 Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); Alharbi v. Miller, 368 F. Supp. 3d 527, 103 Fed. R. Serv. 3d 384 (E.D. N.Y. 2019).
Substantive due-process analysis requires a test of reasonableness of a statute in relation to the state's power to enact such legislation. Town & Country Foods, Inc. v. City of Bozeman, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283 (2009).

3 Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973); In re Roel, 3 N.Y.2d 224, 165 N.Y.S.2d 31, 144 N.E.2d 24 (1957); Bunch v. Britton, 253 N.C. App. 659, 802

S.E.2d 462 (2017); In re Lutker, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
The test for determining whether a statute violates substantive due-process rights is whether it bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive. Ilkanic v. City of Fort Lauderdale, 705 So. 2d 1371 (Fla. 1998).

[4] State v. Robinson, 873 So. 2d 1205 (Fla. 2004).
As to the requirement of a rational basis for legislative classifications for equal protection purposes, generally, see § 861.

[5] Gamble v. City of Escondido, 104 F.3d 300, 19 A.D.D. 740 (9th Cir. 1997).

[6] Sammon v. New Jersey Bd. of Medical Examiners, 66 F.3d 639 (3d Cir. 1995); Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 32 Fed. R. Serv. 3d 25 (11th Cir. 1995); Blue v. McBride, 252 Kan. 894, 850 P.2d 852 (1993), as modified on denial of reh'g, (July 21, 1993); Dempsey v. Alston, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009).
Keeping a list of predatory offenders is rationally related to the legitimate state interest of solving crimes; thus, the predatory offender registration statute does not violate a defendant's constitutional right to substantive due process. Boutin v. LaFleur, 591 N.W.2d 711 (Minn. 1999).

[7] Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 957 A.2d 821 (2008).
Legislation need not expressly state a rationale nor must it contain legislative findings to support the law; rather, the legislation survives a substantive due-process challenge if the court can conceive of a rational basis for the legislation. Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287 (Ct. App. 2011).
A statute suspending the Social Security retirement benefits of a convicted felon during incarceration did not violate substantive due process as the statute had the rational basis of conserving scarce resources. Butler v. Apfel, 144 F.3d 622 (9th Cir. 1998).

[8] Immediato v. Rye Neck School Dist., 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996); Montgomery v. Daniels, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975).
Under the rational basis test, the court's inquiry into the constitutionality of a statute is twofold: the court must determine whether there is a legitimate state interest behind the legislation, and if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it. People v. Johnson, 225 Ill. 2d 573, 312 Ill. Dec. 350, 870 N.E.2d 415 (2007).

[9] Parrino v. Price, 869 F.3d 392 (6th Cir. 2017); Silvio Membreno and Florida Ass'n of Vendors, Inc. v. City of Hialeah, 188 So. 3d 13 (Fla. 3d DCA 2016); People v. Maillet, 2019 IL App (2d) 161114, 2019 WL 2754563 (Ill. App. Ct. 2d Dist. 2019); Baddock v. Baltimore County, 239 Md. App. 467, 197 A.3d 546 (2018), cert. denied, 463 Md. 545, 206 A.3d 325 (2019).

[10] Silvio Membreno and Florida Ass'n of Vendors, Inc. v. City of Hialeah, 188 So. 3d 13 (Fla. 3d DCA 2016); People v. Pepitone, 2018 IL 122034, 423 Ill. Dec. 816, 106 N.E.3d 984 (Ill. 2018).

[11] In re Maurice D., 393 Ill. Dec. 389, 34 N.E.3d 590 (App. Ct. 4th Dist. 2015).

[12] Sammon v. New Jersey Bd. of Medical Examiners, 66 F.3d 639 (3d Cir. 1995); FM Properties Operating Co. v. City of Austin, 93 F.3d 167 (5th Cir. 1996) (holding that a rational basis review under the Due Process Clause does not authorize the federal judiciary to sit as a superlegislature to judge the wisdom or desirability of state legislative policy determinations).

[13] Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996); Valot v. Southeast Local School Dist. Bd. of Educ., 107 F.3d 1220, 1997 FED App. 0087P (6th Cir. 1997); Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass'n, 110 F.3d 547 (8th Cir. 1997).

[14] FM Properties Operating Co. v. City of Austin, 93 F.3d 167 (5th Cir. 1996); Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995).
Where plaintiffs rely on substantive due process to challenge a governmental action that does not impinge on fundamental rights, a court does not require that the government's action actually advance its stated purpose; instead, it is sufficient that the government could have had a legitimate reason for acting as it did. Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994), as amended on denial of reh'g, (Feb. 9, 1995).

15 Sylvia Landfield Trust v. City of Los Angeles, 729 F.3d 1189 (9th Cir. 2013).

16 Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996), as amended on denial of reh'g and reh'g en banc, (Sept. 17, 1996).

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16B Am. Jur. 2d Constitutional Law § 956

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 956. Strict scrutiny of interference with fundamental rights and discriminatory classifications for substantive due-process analysis

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3897 to 3901

A.L.R. Library

School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235

Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1

Where an individual interest involves a fundamental right, the test of substantive due process is whether a compelling state interest is advanced by the regulation and whether the regulation is the least restrictive method available to effectuate the compelling state interest.[1] Under such a strict scrutiny analysis, legislation which significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest[2] and is narrowly tailored to effectuate only that interest.[3]

Observation:

This test of the "least restrictive method" in advancing a "compelling state interest" is similar to the test of the "two-tiered" standard used in considering equal protection issues.[4]

Rights are "fundamental," requiring a governmental regulation infringing those rights to be narrowly tailored to serve a compelling state interest, when they are implicit in the concept of ordered liberty or deeply rooted in the nation's history and tradition.[5]

It has been said that substantive due-process challenges, just as equal protection ones, require a court to determine whether the challenged policy or statute creates a suspect class or affects a fundamental right.[6] Unless a classification is a hostile and oppressive discrimination against particular persons and classes, it will not trigger heightened scrutiny.[7]

Footnotes

1 Immediato v. Rye Neck School Dist., 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996).

2 Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997); Hayashi v. Illinois Dept. of Financial and Professional Regulation, 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014); Sparks v. Sparks, 2013 ME 41, 65 A.3d 1223 (Me. 2013).

3 Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997); Hayashi v. Illinois Dept. of Financial and Professional Regulation, 2014 IL 116023, 388 Ill. Dec. 878, 25 N.E.3d 570 (Ill. 2014).
A government memo, providing that the advancement of funds to cover the legal fees of accounting firm employees, suspected of committing accounting fraud, would be considered as a negative factor in assessing whether the employer was sufficiently cooperating with the government investigation to forestall the indictment, violated the Due Process Clause, when analyzed under the strict scrutiny test; while the provision advanced a compelling government interest in being able to investigate instances of fraud, it was not narrowly tailored to achieve the objective, as the payments to be considered were not limited to those actually used to obstruct the investigation, and the relationship between the payments and the level of employer cooperation was problematic. U.S. v. Stein, 435 F. Supp. 2d 330 (S.D. N.Y. 2006), aff'd, 541 F.3d 130 (2d Cir. 2008).

4 People v. Santiago, 51 A.D.2d 1, 379 N.Y.S.2d 843 (2d Dep't 1975), order rev'd on other grounds, 40 N.Y.2d 990, 391 N.Y.S.2d 67, 359 N.E.2d 663 (1976).
As to standards of review used in considering equal protection issues, generally, see §§ 849 to 854.

5 § 935.

6 Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).
For the purposes of due-process analysis, a city council's amendment extending term limits for city officials from two terms to three terms neither interfered with a fundamental right nor singled out a suspect classification. Molinari v. Bloomberg, 564 F.3d 587 (2d Cir. 2009).

7 Deja Vu Showgirls v. State, Dept. of Tax., 130 Nev. 719, 334 P.3d 392, 130 Nev. Adv. Op. No. 73 (2014).

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16B Am. Jur. 2d Constitutional Law § 957

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

a. Overview

§ 957. Rights protected by substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3894

A.L.R. Library

Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1

The substantive component of the Due Process Clause protects only those rights that are fundamental.[1] The protection of substantive due process is narrow and covers only state action which is so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any predeprivation procedural protections or of adequate rectification by any postdeprivation state remedies.[2]

According to these principles, for instance, a state constitutional provision permitting individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited does not deny the shopping center owner due process in that such a law is not unreasonable, arbitrary, or capricious.[3] Losses from random and unauthorized official acts are likewise not violations of the Due Process Clause so long as there is an adequate postdeprivation remedy.[4] Moreover, a city's alleged failure to follow state law in denying a permit to renovate two apartment buildings is not a substantive due-process violation.[5] Nevertheless, substantive due-process protection has been extended to certain rights, such as the right to privacy, that are not enumerated in the Bill of Rights.[6] For instance, a parent's interest in the care, custody, and control over his or her child is a fundamental right which is protected by substantive due process.[7]

Footnotes

[1] Wright v. Lovin, 32 F.3d 538, 93 Ed. Law Rep. 1136 (11th Cir. 1994); Nelson v. City of Orem, 2013 UT 53, 309 P.3d 237 (Utah 2013).
Substantive due process under the 14th Amendment depends on the existence of a fundamental liberty interest. Idris v. City of Chicago, Ill., 552 F.3d 564 (7th Cir. 2009).
Whether a property interest is of a particular quality protected by substantive due process depends on whether the interest is fundamental under the United States Constitution. Temple-Inland, Inc. v. Cook, 82 F. Supp. 3d 539 (D. Del. 2015).

[2] Siena Corporation v. Mayor and City Council of Rockville Maryland, 873 F.3d 456 (4th Cir. 2017).
Substantive due process prevents the government from enacting legislation that is arbitrary or discriminatory or lacks a reasonable relationship to a proper legislative purpose. Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997).
As to protection from arbitrary and capricious action, see § 958.

[3] PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

[4] Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).

[5] Albiero v. City of Kankakee, 122 F.3d 417, 38 Fed. R. Serv. 3d 1008 (7th Cir. 1997).

[6] Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995).

[7] Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 957 A.2d 821 (2008).

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16B Am. Jur. 2d Constitutional Law § 958

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 958. Arbitrary or capricious actions as violating substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3892 to 3901, 3903

A.L.R. Library

School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235

Seeking of variance as prerequisite for ripeness of challenge to zoning ordinance under due process clause of Federal Constitution's Fifth and Fourteenth Amendments—post-Williamson cases, 111 A.L.R. Fed. 483

Protection from arbitrary action is the essence of substantive due process.[1] Due process demands that a law not be unreasonable or arbitrary and that it be reasonably related and applied to an actual and manifest evil.[2] The modern framework for a substantive due-process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose.[3]

A statute or a municipal ordinance is arbitrary and capricious and, hence, is constitutionally invalid as transgressing due-process requirements if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest; however, if any conceivable legitimate governmental interest supports the ordinance, that measure is not arbitrary and capricious and, hence, cannot offend substantive due-process norms.[4] Moreover, the courts, as custodians of the judicial powers of government, are not obliged to enforce a statute which, through a rule of

evidence, arbitrarily deprives a litigant of his or her rights or which permits a defendant to suffer conviction without due process of law.[5]

Observation:

The means by which an ordinance comes to pass is irrelevant to the question of whether the substance of an ordinance is constitutionally infirm on its face under substantive due-process analysis.[6]

A statute runs afoul of the Due Process Clause only if it manifests a patently arbitrary classification, utterly lacking in any rational justification.[7] Thus, due process may be violated if the government acts arbitrarily or capriciously.[8]

Practice Tip:

To establish a violation of substantive due process arising from some challenged governmental conduct, a plaintiff is ordinarily required to prove that such conduct is clearly arbitrary and unreasonable, having no substantial relationship to the public's health, safety, morals, or general welfare.[9] Plaintiffs challenging an economic statute on substantive due-process grounds have the burden of proving that the statute is arbitrary and irrational such that no rational relationship exists between the statute and any legitimate government objective.[10]

All state statutes, ordinances, and regulations may be challenged on the basis that they are wholly arbitrary or irrational in purpose or means.[11] However, the states have considerable flexibility, for instance, in determining the level of punitive damages that they will allow in different classes of cases and in any particular case and only when an award can fairly be categorized as grossly excessive in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the 14th Amendment.[12] Although a reasonableness standard rather than a precise formula is imposed on the award of substantive damages, the Due Process Clause of the United States Constitution does impose a substantive limit on punitive damage awards, and such decision should not be committed to the unreviewable discretion of a jury.[13]

Footnotes

1 Slochower v. Board of Higher Ed. of City of New York, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956); Jack Lincoln Shops v. State Dry Cleaners' Bd., 1943 OK 28, 192 Okla. 251, 135 P.2d 332 (1943).
The touchstone of due process is protection of the individual against arbitrary actions of the government. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Jauch v. Choctaw County, 874 F.3d 425 (5th Cir. 2017), cert. denied, 139 S. Ct. 638, 202 L. Ed. 2d 491 (2018); Dias v. City and County of Denver, 567 F.3d 1169 (10th Cir. 2009); Bailey v. Kirsch, 2020 WL 605881 (E.D. Pa. 2020); State v. Schmidt, 220 Ariz. 563, 208 P.3d 214 (2009); Bonner v. City of Brighton, 495 Mich. 209, 848 N.W.2d 380 (2014).

2 Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).
A claim that a person is entitled to substantive due process means that state action which deprives him or her of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary. Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974).

As to the standard of reasonableness and the rational basis test with regard to substantive due process, generally, see § 955.

[3] Immediato v. Rye Neck School Dist., 73 F.3d 454, 106 Ed. Law Rep. 85 (2d Cir. 1996); Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass'n, 110 F.3d 547 (8th Cir. 1997).

[4] 37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614, 1997 FED App. 0158P (6th Cir. 1997).
A rule is arbitrary and capricious, and thus, violates due process when it lacks a legitimate reason to support it; administrative rules are supported by legitimate reasons when they are based on some legitimate position of the administrative agency promulgating them. Texas Workers' Compensation Com'n v. Patient Advocates of Texas, 136 S.W.3d 643 (Tex. 2004).
As to legitimate governmental interests and the reasonableness requirement in this regard, see § 955.

[5] People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968) (rejected on other grounds by, California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)) and (rejected on other grounds by, People v. Chavez, 26 Cal. 3d 334, 161 Cal. Rptr. 762, 605 P.2d 401 (1980)).

[6] WMX Technologies, Inc. v. Gasconade County, Mo., 105 F.3d 1195 (8th Cir. 1997).

[7] U.S. v. Neal, 46 F.3d 1405 (7th Cir. 1995) (rejected on other grounds by, U.S. v. Muschik, 49 F.3d 512 (9th Cir. 1995)) and judgment aff'd, 516 U.S. 284, 116 S. Ct. 763, 133 L. Ed. 2d 709 (1996).
In determining the validity, under the Due Process Clause of the 14th Amendment, of a zoning restriction, the critical constitutional inquiry is whether the zoning restriction produces arbitrary or capricious results. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).

[8] Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099 (3d Cir. 1997); Williams v. Wynne, 533 F.3d 360 (5th Cir. 2008); State v. Robinson, 873 So. 2d 1205 (Fla. 2004); Town & Country Foods, Inc. v. City of Bozeman, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283 (2009); State v. Germane, 971 A.2d 555 (R.I. 2009).

[9] Patel v. Penman, 103 F.3d 868 (9th Cir. 1996).

[10] In re Blue Diamond Coal Co., 79 F.3d 516, 1996 FED App. 0097P (6th Cir. 1996).

[11] Coleman v. Watt, 40 F.3d 255, 30 Fed. R. Serv. 3d 982 (8th Cir. 1994).

[12] BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

[13] Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994).

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16B Am. Jur. 2d Constitutional Law § 959

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 959. Bias and bad faith as violating substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3880, 3892 to 3895

To support a claim of a substantive due-process violation, a plaintiff must show some irrational government action or government action that is motivated by bias, some improper purpose, or bad faith.[1]

Due-process guarantees an absence of actual bias on the part of a judge.[2] Under the Due Process Clause, no one can be a judge in his or her own case, and no one is permitted to try cases where he or she has an interest in the outcome.[3] The Fourteenth Amendment's Due Process Clause may sometimes demand recusal even when a judge has no actual bias, recusal being required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.[4] A requirement that justice must satisfy the appearance of justice, even to the point of requiring a trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties, applies where a private party is given statutory authority to adjudicate a dispute.[5] To implicate due process, claims of general institutional bias must be harnessed to a further showing, such as a potential conflict of interest or pecuniary stake in the outcome of the litigation.[6]

Footnotes

[1] Ersek v. Township of Springfield, 102 F.3d 79 (3d Cir. 1996).
The destruction during Hurricane Katrina of certain seized patient records did not result in a due-process violation and require suppression of the remaining files, absent a showing that the government acted in bad faith, in a prosecution

for conspiracy to illegally dispense prescription drugs. U.S. v. Prejean, 429 F. Supp. 2d 782 (E.D. La. 2006).
As to protection from arbitrary and capricious actions, generally, see § 958.

[2] Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).

[3] Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).

[4] Rippo v. Baker, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017).

[5] Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

[6] Brooks v. New Hampshire Supreme Court, 80 F.3d 633 (1st Cir. 1996).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 960. Oppressive or shocking behavior as violating substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3896

A.L.R. Library

School's Violation of Student's Substantive Due Process Rights by Suspending or Expelling Student, 90 A.L.R.6th 235

State conduct offends substantive due process when it shocks the conscience,[1] constitutes a force that is so brutal as to offend even hardened sensibilities,[2] or is offensive to human dignity.[3] In fact, only a substantial infringement of state law prompted by personal or group animus or a deliberate flouting of the law that trammels significant personal or property rights is a substantive due-process violation.[4] Substantive due process prevents governmental power from being used for purposes of oppression or an action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.[5] The "shock the conscience" standard is satisfied where the conduct was intended to injure in some way unjustifiable by any government interest, or in some circumstances if it resulted from deliberate indifference.[6] However, negligence, without more, is simply insufficient to meet the conscience-shocking standard to demonstrate a substantive due-process violation.[7] It is not enough that the government official's behavior meets the lowest common denominator of customary tort liability.[8]

Due process can serve as a check on legislative enactments thought to infringe on fundamental rights otherwise not explicitly protected by the Bill of Rights, as a check on official misconduct which infringes on a fundamental right or as a limitation on official misconduct which, although not infringing on a fundamental right, is so literally conscience-shocking, and hence

oppressive, as to rise to the level of a substantive due-process violation.[9] However, a mere violation of state law is not the kind of truly irrational governmental action which gives rise to a substantive due-process claim.[10]

Due process is not merely a procedural safeguard; instead, it reaches those situations where the deprivation of life, liberty, or property is accomplished by legislation which, by operating in the future, can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three.[11] Where a government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest.[12]

Observation:

The fact that a statute may, in certain instances, be inequitable, harsh, or oppressive does not violate the Due Process Clause, provided that it operates without any discrimination and in like manner against all persons of a class.[13] For instance, deliberate indifference that shocks in one environment may not be so patently egregious in another, and concern with preserving constitutional proportions of substantive due-process demands exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.[14]

Footnotes

1 Rosales-Mireles v. U.S., 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018); L.R. v. School District of Philadelphia, 836 F.3d 235, 336 Ed. Law Rep. 90 (3d Cir. 2016); Jordan v. Fisher, 823 F.3d 805 (5th Cir. 2016), as revised, (June 27, 2016); Williams v. Mannis, 889 F.3d 926 (8th Cir. 2018).

2 Faucher v. Rodziewicz, 891 F.2d 864 (11th Cir. 1990).

3 Williams v. Mannis, 889 F.3d 926 (8th Cir. 2018).

4 Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).
Substantial prejudice is required to establish a violation of due process. Felder v. Charleston County School Dist., 327 S.C. 21, 489 S.E.2d 191, 120 Ed. Law Rep. 616 (1997).

5 Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Educ. of the District of Columbia, 109 F.3d 774, 117 Ed. Law Rep. 42 (D.C. Cir. 1997).
A court would have to see a mindless abuse of power, or a deliberate exercise of power as an instrument of oppression, or power exercised without any reasonable justification in the service of a legitimate governmental objective before delayed incarceration would shock the conscience for the purpose of demonstrating that delayed incarceration amounted to a waiver of incarceration by the state under the Due Process Clause. Bonebrake v. Norris, 417 F.3d 938 (8th Cir. 2005).
As to legitimate governmental interests and the reasonableness requirement in this regard, see § 955.

6 Rosales-Mireles v. U.S., 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018).

7 Gonzalez-Fuentes v. Molina, 607 F.3d 864 (1st Cir. 2010).

8 White v. Smith, 696 F.3d 740 (8th Cir. 2012).

9 Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996); L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202 (R.I. 1997).
The alleged conduct of the then-governor of Puerto Rico, in exerting undue influence over the board of directors for a

government-sponsored banking institution so that the directors would deny a loan for which a pharmaceutical company qualified due to the company's political affiliations did not rise to the level of conscience-shocking behavior required to support the company's substantive due-process claim against the former governor. Pagan v. Calderon, 448 F.3d 16 (1st Cir. 2006).

[10] WMX Technologies, Inc. v. Gasconade County, Mo., 105 F.3d 1195 (8th Cir. 1997).
A state-law violation does not give rise to a substantive due-process violation although the manner in which violation occurs as well as its consequences are crucial factors to be considered. Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).

[11] Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961).

[12] Valot v. Southeast Local School Dist. Bd. of Educ., 107 F.3d 1220, 1997 FED App. 0087P (6th Cir. 1997).
As to the standard of reasonableness and the rational basis test with regard to substantive due process, generally, see § 955.

[13] Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (holding that a statute is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work an inequitable result).
That certain members of a class subject to a regulation may suffer greater economic loss than others does not render the regulation violative of due process if it is fair and equitable to class as whole. Rasulis v. Weinberger, 502 F.2d 1006 (7th Cir. 1974).
As to discrimination and heightened scrutiny under substantive due process, see § 956.
As to the necessity that laws operate equally, generally, see § 961.

[14] County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 961. Necessity that laws operate equally for substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3861, 3893, 3902, 3906

A.L.R. Library

Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases, 19 A.L.R. Fed. 2d 1

Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases, 178 A.L.R. Fed. 25

Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases, 172 A.L.R. Fed. 1

Although the Fifth Amendment contains no Equal Protection Clause and restrains only such discriminatory legislation by Congress as amounts to a denial of due process,[1] "due process of law" and the equivalent phrase "law of the land"[2] have frequently been defined to mean a general[3] and public law operating equally on all persons in like circumstances[4] and not a partial or private law affecting the rights of a particular individual or class of individuals[5] in a way in which the same rights of other persons are not affected.[6]

To avoid overbreadth, the Due Process Clause does not require Congress to make statutory classifications that fit every individual with precisely the same degree of relevance[7] although a clear and precise enactment may nevertheless be

overbroad if in its reach it prohibits constitutionally protected conduct.[8] Subject to that caveat, under this guarantee not only must a statute embrace all persons in a like situation, but the classification also must be natural and reasonable, not arbitrary and capricious.[9] Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class or of the community at large unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community.[10]

In order to make out a disparate impact warranting further scrutiny of a federal statutory classification under the equal protection analysis of the Due Process Clause of the Fifth Amendment, it is necessary to show that the class which is purportedly discriminated against suffers a significant deprivation of a benefit or imposition of a substantial burden.[11] An act which affects only and exhausts itself upon a particular person or his or her rights and privileges and has no relation to the community in general, is rather a sentence than a law and one which condemns without a hearing. However, due process is not violated by legislation which does not find equivalence where there is none or which does not lay on a burden unrelated to privilege or benefit.[12] As a general rule, whatever, in the matter of classification, complies with the requirements as to the equal protection of the laws will, so far as such an objection is concerned, be likewise upheld as amounting to due process of law. In fact, the courts may refer to both clauses at once in discussing the constitutionality of statutes.[13]

Footnotes

1 § 825.

2 § 943.

3 Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 L. Ed. 629, 1819 WL 2201 (1819); Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); J.O. Plott Co. v. H.K. Ferguson Co., 202 N.C. 446, 163 S.E. 688 (1932).

4 Jones v. Brim, 165 U.S. 180, 17 S. Ct. 282, 41 L. Ed. 677 (1897); Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944); Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); In re Lutker, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).
A state can, consistently with the 14th Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination. Douglas v. People of State of Cal., 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).
Due process is secured by laws operating on all alike. Sexton v. Barry, 233 F.2d 220, 1 Ohio Op. 2d 231, 75 Ohio L. Abs. 71 (6th Cir. 1956).

5 Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943).
As to the fact that due process of law as guaranteed by the 14th Amendment has frequently been defined in terms of equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice, see § 824.

6 State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)).
The Department of Housing and Urban Development's decision, permitting a city's urban renewal project to proceed after it became aware that discrimination was being practiced by the city, constituted a denial of the Fifth Amendment right of due process owed to the black plaintiffs and by failing to halt such program, which had the effect of displacement of black residents without relocation, the Department perpetuated segregation in public housing and participated in a denial to the plaintiffs of their constitutional rights. Garrett v. City of Hamtramck, 503 F.2d 1236, 19 Fed. R. Serv. 2d 514 (6th Cir. 1974).

7 U.S. v. McKenzie, 99 F.3d 813 (7th Cir. 1996).

8 Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

9 People ex rel. Doty v. Connell, 9 Ill. 2d 390, 137 N.E.2d 849, 62 A.L.R.2d 1255 (1956); State v. Garford Trucking, 4

N.J. 346, 72 A.2d 851, 16 A.L.R.2d 1407 (1950).
The Due Process Clause bars a statute which manifests a patently arbitrary classification, utterly lacking in rational justification. Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).
The Due Process Clause bars federal legislation embodying a baseless classification. Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).
As to the relationship between due process of law and equal protection of the laws, see §§ 824, 825.
As to protection against arbitrary and capricious actions, see § 958.

10 Metropolitan Trust Co. v. Jones, 384 Ill. 248, 51 N.E.2d 256, 149 A.L.R. 1416 (1943); Patino v. Catherwood, 29 N.Y.2d 331, 327 N.Y.S.2d 638, 277 N.E.2d 658 (1971).
Legislation, even though it is within the police power, may violate due process if it is discriminatory in that it deals differently with different classes of persons without the existence of some natural and substantial difference, germane to the substantive purposes of the legislation, between those within the class included and those whom it leaves untouched. State v. Hurliman, 143 Conn. 502, 123 A.2d 767 (1956).
As to discrimination and heightened scrutiny under substantive due process, see § 956.

11 Califano v. Boles, 443 U.S. 282, 99 S. Ct. 2767, 61 L. Ed. 2d 541 (1979).

12 U.S. v. Manufacturers Nat. Bank of Detroit, 363 U.S. 194, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960).

13 Knebel v. Hein, 429 U.S. 288, 97 S. Ct. 549, 50 L. Ed. 2d 485 (1977); State v. Garford Trucking, 4 N.J. 346, 72 A.2d 851, 16 A.L.R.2d 1407 (1950); People v. Passantino, 83 Misc. 2d 409, 372 N.Y.S.2d 451 (N.Y. City Ct. 1975).

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16B Am. Jur. 2d Constitutional Law § 962

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 962. Definiteness or vagueness of laws, regulations, and orders as related to substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3905

A.L.R. Library

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct, 12 A.L.R.3d 1448

The void-for-vagueness doctrine is embodied in the Due Process Clauses of the Fifth and 14th Amendments,[1] and it is a general principle of statutory law that a statute must be definite to be valid.[2] The protections provided by the Due Process Clause of the Fifth Amendment require the invalidation of laws that are impermissibly vague.[3]

Under due-process principles, laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.[4] To pass constitutional muster, a statute challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited[5] or what the law demands of them,[6] and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.[7] The void-for-vagueness doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.[8] In that sense, the doctrine is a corollary of the separation of powers, requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.[9]

A statute is so vague as to violate the Due Process Clause where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices or where its language is such that people of common intelligence must necessarily guess at its meaning.[10] Conversely, a statute is not unconstitutionally vague where it is set out in terms as to which an ordinary person exercising ordinary common sense can sufficiently understand and comply.[11] The standard of definiteness which statutory language must meet if the statute is to comport with the requirements of due process is not one which it is impossible to satisfy.[12] A statute is sufficiently definite for purposes of due process if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.[13] A statute does not offend against the Due Process Clause because it contains no preamble or other statement of purposes and objectives.[14]

Observation:

A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague in violation of due process; however, to succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications.[15]

Obviously, a statute is not unconstitutionally vague merely because it is stringent and harsh.[16] Moreover, a statute is not unconstitutionally vague merely because clearer and more precise language might have been used since the United States Constitution does not require impossible standards of statutory clarity.[17] In addition, a statute or regulation is not so vague as to deny due process merely because it occasionally requires the trier-of-fact to determine the question of reasonableness.[18] Similarly, there is authority for the view that a statute will be upheld by the Supreme Court against an attack on the ground of vagueness where an appropriate construction of the statute by a state court has removed such alleged vagueness.[19] In determining the constitutionality of a statutory provision alleged to be void for vagueness, the state courts are bound by the standard of vagueness laid down by the United States Supreme Court.[20]

The degree of statutory imprecision which the Constitution's Due Process Clause allows varies with the nature of the enactment[21] and the correlative needs for notice and protection from unequal enforcement.[22] Thus, courts demand less precision of statutes that impose only civil penalties than of criminal statutes because their consequences are less severe.[23] Moreover, the vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedoms affirmatively guaranteed by the United States Constitution.[24] For instance, while vague laws in any area are constitutionally infirm,[25] when First Amendment rights are involved, the court looks even more closely lest under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer; such a law must be narrowly drawn to prevent the supposed evil.[26]

The rules as to definiteness and vagueness apply also to an order of a court.[27] In addition, an executive order must, in order to satisfy the constitutional requirement of due process, show the existence of the particular circumstances and conditions under which the making of such an order has been authorized by Congress, but Congress may ratify such an order either expressly or implicitly.[28]

CUMULATIVE SUPPLEMENT

Cases:

In prohibiting overly vague laws, the due process void-for-vagueness doctrine seeks to ensure that persons of ordinary intelligence have fair warning of what a law prohibits, and, in cases where the statute abuts upon sensitive areas of basic First

Amendment freedoms, avoid chilling the exercise of First Amendment rights. U.S. Const. Amends. 1, 14. ACA Connects - America's Communications Association v. Frey, 471 F. Supp. 3d 318 (D. Me. 2020).

[END OF SUPPLEMENT]

Footnotes

[1] Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1995 FED App. 0203P (6th Cir. 1995); Stephenson v. Davenport Community School Dist., 110 F.3d 1303, 117 Ed. Law Rep. 443 (8th Cir. 1997).
The vagueness doctrine is founded solely on the requirement of due process and may not be applied unless the challenged rule affects interests protected by the Due Process Clause. Maroney v. University Interscholastic League, 764 F.2d 403, 25 Ed. Law Rep. 765 (5th Cir. 1985).

[2] Am. Jur. 2d, Statutes § 234; Am. Jur. 2d, Criminal Law § 15.

[3] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).

[4] Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018); F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).

[5] Upton v. S.E.C., 75 F.3d 92 (2d Cir. 1996); Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).

[6] United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019); F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).
The purpose of the fair notice requirement under the vagueness doctrine is to enable the ordinary citizen to conform his or her conduct to the law as no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

[7] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012); U.S. v. Wunsch, 84 F.3d 1110 (9th Cir. 1996); Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).

[8] Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).
An unconstitutionally vague law invites arbitrary enforcement in this sense if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, or permits them to prescribe the sentences or sentencing range available. Beckles v. U.S., 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).

[9] Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).

[10] Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Georgia Pacific Corp. v. Occupational Safety and Health Review Com'n, 25 F.3d 999 (11th Cir. 1994); Wotton v. Bush, 41 Cal. 2d 460, 261 P.2d 256 (1953); Trio Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 163 N.Y.S.2d 585, 143 N.E.2d 329 (1957); State v. Abner, 43 Ohio App. 2d 141, 72 Ohio Op. 2d 355, 334 N.E.2d 530 (8th Dist. Cuyahoga County 1974).
The 14th Amendment's due-process doctrine concerning vagueness of statutes incorporates notions of fair notice or warning and requires legislatures to set reasonably clear guidelines for law enforcement officials and triers-of-fact in order to prevent arbitrary and discriminatory enforcement; there is a denial of due process where inherently vague statutory language permits selective law enforcement. Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

[11] Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); People v. Cilento, 2 N.Y.2d 55, 156 N.Y.S.2d 673, 138 N.E.2d 137 (1956).

12 Kingsley Intern. Pictures Corp. v. Regents of University of N.Y., 4 N.Y.2d 349, 175 N.Y.S.2d 39, 151 N.E.2d 197 (1958), judgment rev'd on other grounds, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959).

13 Associated Builders and Contractors, Saginaw Valley Area Chapter v. Director, Dept. of Consumer & Industry Services, 267 Mich. App. 386, 705 N.W.2d 509 (2005).

14 Serrer v. Cigarette Service Co., 35 Ohio Op. 260, 74 N.E.2d 841 (C.P. 1946), judgment aff'd, 48 Ohio L. Abs. 484, 74 N.E.2d 853 (Ct. App. 8th Dist. Cuyahoga County 1947), judgment aff'd, 148 Ohio St. 519, 36 Ohio Op. 171, 76 N.E.2d 91 (1947).

15 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

16 Barsky v. Board of Regents of University, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954).

17 U. S. v. Powell, 423 U.S. 87, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975); State v. Schuster's Exp. Inc., 5 Conn. Cir. Ct. 472, 256 A.2d 792 (1969); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), judgment aff'd, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

18 State v. Marathon Oil Co., 528 P.2d 293 (Alaska 1974).

19 State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A.L.R. 530 (1940).

20 In re Davis, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (2d Dist. 1966).

21 Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018).

22 Advance Pharmaceutical, Inc. v. U.S., 391 F.3d 377 (2d Cir. 2004).
The due-process determination of whether a statute is impermissibly imprecise, indefinite, or incomprehensible must be made in light of the facts presented in the given case and the nature of the enactment challenged. Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

23 Little Arm Inc. v. Adams, 13 F. Supp. 3d 914 (S.D. Ind. 2014); Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).
The Due Process Clause's prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process. Johnson v. U.S., 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

24 Colautti v. Franklin, 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979).

25 Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966); Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

26 Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966).
A state statute which required teachers to take an oath promising that they would support the constitutions and laws of the state and the United States and would, by precept and example, promote respect for the flag and the institutions of the state and the United States was unconstitutionally vague; the vice of unconstitutional vagueness was further aggravated because the statute operated to inhibit First Amendment freedoms. Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964).

27 McCreery v. Libby-Owens-Ford Glass Co., 363 Ill. 321, 2 N.E.2d 290, 105 A.L.R. 75 (1936).

28 Am. Jur. 2d, United States § 23.

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16B Am. Jur. 2d Constitutional Law § 963

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 963. Lack of success before tribunal as violating substantive due process; errors of tribunal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3893

The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of the due process of law guarantee[1] since due process secures only an opportunity to be heard, not guaranteed or probable success.[2] Nor is due process denied the unsuccessful party merely because a judgment awards relief other than and different from that which has been sought in the pleadings.[3] The 14th Amendment does not raise a federal question in every case to test the justice of a decision.[4]

Although the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations.[5] The 14th Amendment does not, in guaranteeing due process, assure immunity from judicial error.[6] Moreover, not every trial error or infirmity which might call for application of an appellate court's supervisory powers correspondingly constitutes a failure to observe that fundamental fairness essential to the very concept of justice.[7] Even an erroneous decision of a court on matters within its jurisdiction does not deprive the unsuccessful party of his or her rights under this guarantee where the parties have been fully heard in the regular course of judicial proceedings.[8] The same rule applies to the errors of other tribunals or officers.[9] It seems clear that a violation of the Due Process Clause may be committed by the state judiciary at least in construing a state statute.[10] However, the United States Supreme Court cannot interfere unless the judgment amounts to a merely arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.[11]

Footnotes

1 Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937); Melville v. Weybrew, 108 Colo. 520, 120 P.2d 189 (1941).
A misapprehension by a litigant of the steps which his or her best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance but not grounds for interference as a denial of constitutional rights. Market St. Ry. Co. v. Railroad Commission of State of Cal., 324 U.S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945).
When appellants are afforded every opportunity to participate in the proceeding below, the simple fact that the outcome is not as appellants would have wished is not tantamount to any denial of due process. Southwestern Bell Telephone Co. v. Arkansas Public Service Com'n, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

2 Boner v. Eminence R-1 School Dist., 55 F.3d 1339, 100 Ed. Law Rep. 886 (8th Cir. 1995).

3 Connolly v. Bell, 309 N.Y. 581, 132 N.E.2d 852 (1956).

4 Buchalter v. People of State of New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943).

5 Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Educ. of the District of Columbia, 109 F.3d 774, 117 Ed. Law Rep. 42 (D.C. Cir. 1997).

6 Stein v. People of State of New York, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (overruled in part on other grounds by, Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964)).
A mere error of state law is not a denial of due process. Swarthout v. Cooke, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011) (rejecting federal-court merits review of the application of all state-prescribed procedures in cases involving liberty or property interests).

7 Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

8 Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962); Chicago Land Clearance Commission v. Darrow, 12 Ill. 2d 365, 146 N.E.2d 1, 68 A.L.R.2d 532 (1957); Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935, 129 A.L.R. 316 (1940); Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172 (1930); Tennessee Cent. Ry. Co. v. Pharr, 183 Tenn. 658, 194 S.W.2d 486 (1946).
It cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of a violation of state law with respect to the conduct of local affairs, and the contention that such a decision is erroneous does not present a federal question. Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission, 309 U.S. 30, 60 S. Ct. 411, 84 L. Ed. 563 (1940).

9 Doty v. Love, 295 U.S. 64, 55 S. Ct. 558, 79 L. Ed. 1303, 96 A.L.R. 1438 (1935) (liquidating agency of a bank).
The United States Constitution cannot feasibly be construed to require federal judicial review for all errors inevitable in the day-to-day administration of affairs by public agencies, and the Due Process Clause of the 14th Amendment is not a guarantee against incorrect or ill-advised personnel decisions. Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

10 Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

11 American Ry. Express Co. v. Commonwealth of Kentucky, 273 U.S. 269, 47 S. Ct. 353, 71 L. Ed. 639 (1927); Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172 (1930).
The Due Process Clause of the 14th Amendment does not enable the United States Supreme Court to review errors of state law, however material under that law. Buchalter v. People of State of New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

3. Substantive Due Process

b. Types of Substantive Due-Process Claims

§ 964. Retrospective or prospective application of statute or judicial decision as related to substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3903, 3907

The Due Process Clause of the Fifth Amendment protects interests in fair notice and repose which may be compromised by retroactive legislation.[1] However, retroactive statutory amendments do not necessarily violate the Due Process Clause simply because they upset settled expectations.[2] While retroactive legislation must meet a burden not faced by legislation that has only future effects, the burden is met simply by showing that the retroactive application of the legislation itself is justified by a rational legislative purpose.[3] Whether there exists a rational basis for retroactive application of statute that would deprive party of vested right involves weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect; implicit in that analysis is a consideration of the unfairness created by the retroactive legislation.[4]

The retrospective aspects of economic legislation, as well as its prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by a rational means.[5] For example, the United States Supreme Court has found that the application of an income tax statute to the entire calendar year in which the enactment takes place does not per se violate the Due Process Clause.[6]

Observation:

When the United States Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling

interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether the events predate or postdate the Supreme Court's announcement of the rule.[7]

The 14th Amendment does not make an act of legislation void merely because it has some retrospective application but, rather, forbids the taking of life, liberty, or property without due process of law, and assuming that statutes of limitations, like other types of legislation, can be so manipulated that their retroactive effects would offend the United States Constitution, the lifting of the bar of a statute of limitations to restore a remedy lost through mere lapse of time is not per se an offense against the 14th Amendment. Congress has the constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period and can constitutionally provide for the retroactive application of an extended limitations period for the filing of a complaint with a government agency.[8]

The highest court of a state, in overruling an earlier decision, may make a choice for itself whether the new rule declared by it will operate prospectively only or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.[9] A court may give its overruling of an earlier decision a retroactive bearing, thereby making invalid that which has been valid in the doing.[10]

Observation:

In appropriate cases, a court may, in the interest of justice, make its ruling prospective only, and this applies in the constitutional area where the exigencies of the situation require such an application. The United States Constitution neither prohibits nor requires retrospective effect.[11] Although an entirely prospective change in the law may disturb the relied-upon expectations of individuals, such a change would not be deemed therefore to be violative of due process, under the United States Constitution.[12]

Footnotes

1 Bank Markazi v. Peterson, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016); Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

2 In re Exide Technologies, 611 B.R. 21 (Bankr. D. Del. 2020).

3 U.S. v. Carlton, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).
The retroactive application of the Illegal Immigration Reform and Immigrant Responsibility Act provision limiting the Attorney General's discretion to grant a waiver of inadmissibility to an alien who assisted the alien's spouse or other family member to illegally enter the country to cases in which the familial relationship existed at the time of the smuggling did not violate the due-process rights of a resident alien who attempted to illegally bring his girlfriend, whom he later married, into the country on his return from a short trip to Mexico; the retroactivity limited only the alien's eligibility for discretionary relief and did not infringe on the right he possessed prior to the amendment, and Congress had a rational basis for the rule of deterring the smuggling of aliens who are not immediate family members. Lopez De Jesus v. I.N.S., 312 F.3d 155 (5th Cir. 2002).

4 Nelson v. Johnson & Johnson, 2019 WL 7047312 (E.D. Wis. 2019).

5 General Motors Corp. v. Romein, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).
In evaluating a substantive due-process challenge to economic legislation, the basic test remains the same regardless of

the retroactive nature of statute: whether the statute is rationally related to a legitimate legislative purpose. Holland v. Keenan Trucking Co., 102 F.3d 736 (4th Cir. 1996).
As to legitimate governmental interests and the reasonableness requirement in this regard, as well as the rational basis test, generally, see § 955.

[6] U. S. v. Darusmont, 449 U.S. 292, 101 S. Ct. 549, 66 L. Ed. 2d 513 (1981).

[7] Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

[8] International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 97 S. Ct. 441, 50 L. Ed. 2d 427 (1976).

[9] Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).
Due process is not denied by a state supreme court's reversal of a previous decision and the application of such reversal to preexisting situations. In re Allis' Will, 6 Wis. 2d 1, 94 N.W.2d 226, 69 A.L.R.2d 1128 (1959).

[10] Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254 (1932).

[11] Tehan v. U.S. ex rel. Shott, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966).

[12] U.S. v. Carlton, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 965. Persons and agencies bound by substantive due process, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3935 to 3945

The guarantee of due process of law which is stated in the Fifth Amendment binds the federal government, while that stated in the 14th Amendment binds the states,[1] and the restraint imposed upon legislation by the Due Process Clauses of the Fifth and 14th Amendments is the same.[2] Thus, the limitations inherent in the requirements as to due process of law are binding equally on the United States[3] and on the several states.[4]

Observation:

While it is for the state courts to determine the adjective as well as the substantive law of a state, they must, in so doing, accord parties due process of law.[5] State law may provide relief beyond the demands of federal due process but under no circumstances may it confine petitioners to a lesser remedy.[6]

The purpose of the Due Process Clause is to exclude arbitrary power from every branch of the government.[7] The protection of the Due Process Clause protects is no less with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.[8] The

constitutional guarantees of due process, whether under the Federal or State Constitution are restraints not only upon persons holding positions specifically classed as executive, legislative, or judicial but upon all administrative and ministerial officials who act under governmental authority.[9] The guarantee is violated whenever any person, by virtue of his or her public governmental position, deprives another of any right protected by the due-process provisions.[10] The guarantee may also be violated by unfairness or corruption of officers in the performance of administrative functions.[11]

Footnotes

1 Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) (overruled on other grounds by, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963)); Massey v. Wheeler, 221 F.3d 1030 (7th Cir. 2000); Smith v. Township Of East Greenwich, 519 F. Supp. 2d 493 (D.N.J. 2007), judgment aff'd, 344 Fed. Appx. 740 (3d Cir. 2009), as amended, (Nov. 3, 2009); Jacobs v. City of Chariton, 245 Iowa 1378, 65 N.W.2d 561 (1954); In re Appropriation for Highway Purposes, 104 Ohio App. 243, 4 Ohio Op. 2d 391, 148 N.E.2d 242 (9th Dist. Lorain County 1957); Rich v. Commonwealth, 198 Va. 445, 94 S.E.2d 549 (1956); Sheesley v. State, 2019 WY 32, 437 P.3d 830 (Wyo. 2019).

2 § 933.

3 State Bd. of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 82 S. Ct. 1380, 8 L. Ed. 2d 620 (1962) (finding that Congress does not have the final say as to what constitutes due process under the 14th Amendment).
As to the Fifth Amendment Due Process Clause as applying to acts of Congress with respect to the inhabitants of a territory or possession of the United States, see Am. Jur. 2d, States, Territories, and Dependencies §§ 141, 142.

4 Brown v. State of New Jersey, 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899).

5 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).

6 Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

7 Charles Tolmas, Inc. v. Police Jury of Parish of Jefferson, 231 La. 1, 90 So. 2d 65 (1956).

8 J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).

9 Betts v. Easley, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).
When the state creates a danger that harms someone, he or she may hold the state actor liable for depriving him or her of substantive due process. Wheeler v. City of Philadelphia, 367 F. Supp. 2d 737 (E.D. Pa. 2005).
As to state and municipal agencies, departments, or officials as bound by due-process provisions, see § 966.

10 Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (holding that, for purposes of the Due Process Clause of the Fifth Amendment, the restraints of the amendment reach far enough to embrace the official actions of a United States Congressperson in hiring and dismissing his or her employees).

11 Norris v. State of Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 966. State and municipal agencies, departments, or officials as bound by substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3937 to 3940

A state may not, by any of its agencies, departments, or officials, whether legislative, judicial, or executive, disregard the constitutional prohibition against denying due process of law.[1] When the action complained of is legislative in nature, however, due process is satisfied when the legislative body performs its responsibilities in a normal manner prescribed by law.[2]

Every state official, high and low, is bound by the 14th Amendment,[3] including officials of the executive[4] and judicial[5] departments of the state. The inhibition includes all functionaries of state government, judicial, as well as political.[6] For example, a state university is a state actor and must comply with the terms of the Due Process Clause when the university decides to impose a serious disciplinary sanction upon one of the university's tenured employees.[7]

Likewise, the acts and practices of a commission created by a state legislature for the purpose of combating juvenile delinquency which directly and designedly stop the circulation of publications found objectionable by the commissioner are performed under color of state law and so constitute acts of the state within the meaning of the 14th Amendment.[8] While municipalities cannot challenge state actions on federal constitutionality grounds because they are not "persons" within the meaning of the Due Process Clause,[9] municipal ordinances adopted under state authority constitute "state action" within the prohibition of the 14th Amendment,[10] as do actions of municipal and county officials.[11]

Substantive due process under the 14th Amendment requires only that such public officials exercise professional judgment, in a nonarbitrary and noncapricious manner, when depriving an individual of a protected property interest.[12] Generally, the

public official's conduct depriving the plaintiff of life, liberty, or property must be deliberate for there to be a violation, so that mere negligence is not violative of substantive due-process rights.[13] However, under certain circumstances, deliberate indifference may be sufficient to support an allegation of culpability.[14]

Footnotes

1 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
In litigation involving the integration of public schools, local officials, such as members of the school board and the superintendent of schools, stand, from the point of view of the 14th Amendment, as agents of the state. Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 3 L. Ed. 2d 19, 79 Ohio L. Abs. 452, 79 Ohio L. Abs. 462 (1958).
Rights under the 14th Amendment turn on the power of the state, no matter by what organ it acts. Hughes v. Superior Court of Cal. in and for Contra Costa County, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985, 57 Ohio L. Abs. 298 (1950).

2 Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994), as amended on denial of reh'g, (Feb. 9, 1995).
As to procedural due process as requiring notice and hearing in the adoption of general legislation, see § 945.
As to legitimate governmental interests and the reasonableness requirement with regard to substantive due process, as well as the rational basis test, generally, see § 955.

3 U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

4 Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244, 90 A.L.R.3d 728 (1st Dist. 1976).
For the purpose of determining what is state action within the purview of the 14th Amendment, a state or city may act as authoritatively through its executive as through its legislative body. Lombard v. State of La., 373 U.S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963).

5 Barrows v. Jackson, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953); Ex parte McCoy, 32 Cal. 2d 73, 194 P.2d 531 (1948); In re Cosgrave's Will, 225 Minn. 443, 31 N.W.2d 20, 1 A.L.R.2d 175 (1948); Citron v. Mangel Stores Corp., 50 N.Y.S.2d 416 (Sup 1944), judgment aff'd, 268 A.D. 905, 51 N.Y.S.2d 754 (1st Dep't 1944); Commissioners of Sinking Fund of City of Philadelphia v. City of Philadelphia, 324 Pa. 129, 188 A. 314, 113 A.L.R. 202 (1936).
The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011).
The conduct of a state prosecuting attorney and a court reporter in preparing a fraudulent transcript of trial proceedings in a criminal case which transcript is used in a hearing before the highest state court to which the accused has an automatic right of appeal amounts to a denial of due process of law in violation of the 14th Amendment. Chessman v. Teets, 350 U.S. 3, 76 S. Ct. 34, 100 L. Ed. 4 (1955).

6 Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).
In determining whether a state action is violative of the Due Process Clause, it is immaterial whether the state has acted solely through its judicial branch since, whether legislative or judicial, it is still the application of state power which must be scrutinized. National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, 377 U.S. 288, 84 S. Ct. 1302, 12 L. Ed. 2d 325 (1964).

7 National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469, 50 Ed. Law Rep. 17 (1988).

8 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963); Juster Bros. v. Christgau, 214 Minn. 108, 7 N.W.2d 501 (1943).
As to due process as requiring notice and hearing in the adoption of general legislation, see § 945.

9 § 972.

10 Carlson v. People of State of Cal., 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940); Chandler v. City of Arvada, Colorado, 292 F.3d 1236, 13 A.L.R.6th 861 (10th Cir. 2002).

11 Walz v. Town of Smithtown, 46 F.3d 162 (2d Cir. 1995) (holding that homeowners' substantive as well as procedural due-process rights were violated by a town highway superintendent's denial of a street excavation permit to connect a

home to the public water system as a means of extorting land from the homeowners for the widening of a street since under the town code, the superintendent had no discretion to deny the permit and the homeowners had the right not to be compelled to convey land to obtain a water utility service).

A town's issuance of a certificate of occupancy of a house revoking the former conditional use as a two-family dwelling was an affirmative act revoking a prior property right in a nonconforming use, subject to a procedural due-process challenge, despite the claim that the right to a conforming use expired years previously when the house remained unoccupied for one year, after being gutted by fire. Norton v. Town of Islip, 239 F. Supp. 2d 264 (E.D. N.Y. 2003), judgment aff'd, 77 Fed. Appx. 56 (2d Cir. 2003).

As to the observance of due-process requirements in connection with municipal ordinances or acts, generally, see Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 315.

[12] Bluitt v. Houston Independent School Dist., 236 F. Supp. 2d 703 (S.D. Tex. 2002).

[13] Kingsley v. Hendrickson, 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015); Nazelrod v. Garrett County Sanitary District, Inc., 241 F. Supp. 2d 532 (D. Md. 2003).

[14] § 970.

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 967. Congress and federal agencies as bound by substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3936

The great substantive powers of Congress are all subject in their operation to the guarantees of due process contained in the Fifth Amendment,[1] which was intended to protect individuals from congressional power.[2] The amendment has been applied to restrict the powers of Congress within the limitations of due process in the exercise of the war power,[3] the taxing power,[4] the bankruptcy power,[5] and the power to regulate commerce.[6]

An agency created jointly by contracting states is within the reach of the Due Process Clause of the Fifth Amendment.[7] However, the due-process guarantee does not circumscribe the activities of a federal agency that is lacking in power to affect those rights which due process protects.[8]

Footnotes

1 Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A.L.R. 1106 (1935). Congress's decision to treat recidivism and, in particular, the fact that an alien is deported following his conviction of an aggravated felony merely as a sentencing factor upon the alien's subsequent conviction of an illegal reentry offense rather than as an element of that offense did not exceed due process or other constitutional limits on Congress's power to define the elements of a crime. Almendarez-Torres v. U.S., 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

2 In re Bernard L. Madoff Inv. Securities LLC, 440 B.R. 282 (Bankr. S.D. N.Y. 2010).

[3] Am. Jur. 2d, War § 13.

[4] Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (1932).

[5] Am. Jur. 2d, Bankruptcy § 11.

[6] Morgan v. Com. of Va., 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, 165 A.L.R. 574 (1946).
The Fifth Amendment does not require a full and uniform exercise of the commerce power, and Congress may weigh the relative needs and restrict the application of legislative policy to less than an entire field. Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S. Ct. 511, 90 L. Ed. 607 (1946).

[7] Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977), judgment aff'd in part, rev'd in part on other grounds, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979).
The Due Process Clause requires only that an alien allegedly subject to removal must receive notice and a fair hearing at which the Immigration and Naturalization Service (INS) must prove by clear, unequivocal, and convincing evidence that the alien is subject to deportation. Cervantes-Ascencio v. U.S. I.N.S., 326 F.3d 83 (2d Cir. 2003).

[8] Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960).

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 968. Private persons as bound by substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3941, 3942

It is the established general rule that the provisions of the Due Process Clauses in a state constitution and in the United States Constitution are inhibitions upon the powers of governments and their agencies, not upon freedom of action of private persons,[1] including corporations.[2] Nothing in the language of the Due Process Clause requires a state to protect the life, liberty, and property of its citizens against invasion by private actors.[3] Thus, the 14th Amendment itself erects no shield against merely private conduct, however discriminatory or wrongful.[4]

On the other hand, a violation of the due-process guarantee may result from the interplay of governmental and private action where it appears that it is only after the initial exertion of state power that private action takes hold.[5] Although the Due Process Clause of the 14th Amendment protects a property interest only from deprivation by state action and the private use of state-sanctioned private remedies or procedures does not rise to the level of state action, when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.[6] The test for determining "state action" is whether or not there is significant state involvement in the private conduct warranting the application of constitutional due process; that action must proximately result in the injury which is the subject of the complaint.[7] In other words, where the government has become so entangled in the actions of a private party, it may warrant the requirement that such private conduct conform to the constitutional standards of behavior.[8] Under other authority, the test to determine whether a private citizen has become a state actor for purposes of the Fifth Amendment requires consideration of two factors: (1) whether the government has knowledge of and acquiesces in the activity, and (2) the intent of the party performing the activity.[9]

Observation:

The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Due Process Clause of the 14th Amendment,[10] nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities. Although acts of a heavily regulated business entity may more readily be found to be "state" acts than will be acts of an entity lacking such characteristics; nevertheless the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.[11]

All state-regulated businesses affected with a public interest are not "state actors" in all their actions for purposes of the Due Process Clause of the 14th Amendment.[12] Moreover, the United States Supreme Court has indicated that the 14th Amendment does not apply to a private entity merely because that entity has a monopoly under state law.[13]

Observation:

The threshold question in any judicial inquiry into conduct claimed to be violative of the 14th Amendment is whether the state has in some fashion involved itself in what, in another setting, would otherwise be deemed private activity. Purely private conduct does not rise to the level of constitutional significance, absent a significant nexus between the state and the actors or the conduct. This nexus which has been denominated "state action" is an essential requisite to any action grounded on a deprivation of due process of law. Furthermore, where the impetus for the allegedly unconstitutional conduct is private, the state must have significantly involved itself for that action to fall within the ambit of the 14th Amendment.[14]

Footnotes

1 Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); Siefert v. Hamilton County, 951 F.3d 753 (6th Cir. 2020); Doe v. University of Denver, 952 F.3d 1182 (10th Cir. 2020); Natarajan v. Dignity Health, 42 Cal. App. 5th 383, 254 Cal. Rptr. 3d 887 (3d Dist. 2019), as modified on denial of reh'g, (Nov. 20, 2019) and review granted, see cal. rules of court 8.1105 and 8.1115, 259 Cal. Rptr. 3d 195, 459 P.3d 1 (Cal. 2020); People v. Wakefield, 2018 COA 37, 428 P.3d 639 (Colo. App. 2018), cert. denied, 2018 WL 4941723 (Colo. 2018); Hood v. Com., 448 S.W.2d 388 (Ky. 1969); Grinnell Mut. Reinsurance Co. v. Walters, 194 S.W.3d 830 (Mo. 2006); Collazo v. Hicksville Union Free School District, 65 Misc. 3d 268, 108 N.Y.S.3d 708, 370 Ed. Law Rep. 1023 (Sup 2019).
The due-process provision of the Florida Constitution requires state action before becoming applicable. Snipes v. State, 733 So. 2d 1000 (Fla. 1999).

2 Ordower v. Office of Thrift Supervision, 999 F.2d 1183 (7th Cir. 1993).
A contractor which had contracted with the federal government to operate a plant was not a "federal actor" subject to suit for pension benefits brought under the Due Process Clause by retired plant employees since the contractor was a private corporation. Edwards v. U.S., Dept. of Energy, 371 F. Supp. 2d 859 (W.D. Ky. 2005), judgment aff'd, 200 Fed. Appx. 382, 2006 FED App. 0577N (6th Cir. 2006).

3 DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).
The Due Process Clause applies only to governmental deprivations of life, liberty, or property and thus provides no guarantee of government protection from harms caused by private parties. Velez-Diaz v. Vega-Irizarry, 421 F.3d 71 (1st Cir. 2005).

[4] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); Marcus v. McCollum, 394 F.3d 813 (10th Cir. 2004); Freilich v. Board of Directors of Upper Chesapeake Health, Inc., 142 F. Supp. 2d 679 (D. Md. 2001), judgment aff'd, 313 F.3d 205 (4th Cir. 2002).

[5] National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

[6] Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) (finding that a state's limited involvement in the mere running of the period of a self-executing statute of limitations where the state's interest in such a statute is in providing repose for potential defendants and in avoiding stale claims and where the state has no role to play beyond the enactment of the limitations period does not constitute the type of state action required to implicate the protections of the Due Process Clause).

[7] Gotsis v. Lorain Community Hospital, 46 Ohio App. 2d 8, 75 Ohio Op. 2d 18, 345 N.E.2d 641 (9th Dist. Lorain County 1974).
All that is necessary to determine if an entity is a state actor for due-process purposes is to evaluate the nature and extent of state involvement so as to determine if its actions are fairly attributable to the state. Zaleski v. West Virginia Physicians' Mut. Ins. Co., 220 W. Va. 311, 647 S.E.2d 747 (2007).

[8] Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, Connecticut, 514 F.2d 285 (2d Cir. 1975).

[9] State v. Sanders, 452 S.W.3d 300 (Tenn. 2014).

[10] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); McCarthy v. Middle Tennessee Elec. Membership Corp., 466 F.3d 399, 2006 FED App. 0378P (6th Cir. 2006).

[11] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (finding that a state utility commission's approval of a private utility's proposed business practice, as required by state law, did not transmute the utility's business practice into "state action" for purposes of the Due Process Clause of the 14th Amendment, where the commission had not put its own weight on the side of the proposed practice by ordering it, the initiative for the proposed practice coming from the utility rather than the state; at most, the commission's failure to overturn the practice amounted to no more than a determination that the utility was authorized to employ such practice if it so desired).
To transform actions of private parties into those of the federal government, the government must be involved with the activity that causes the actual injury, and it is not enough to show that the government heavily regulates the party whose activities are challenged. Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977).

[12] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (holding that while doctors, optometrists, lawyers, electric utility companies, and grocers are all in state-regulated businesses providing arguably essential goods and services affected with a public interest, nevertheless such a status, absent more, does not convert their every action into that of the state for purposes of the Due Process Clause of the 14th Amendment).

[13] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); Mays v. Buckeye Rural Elec. Co-op., Inc., 277 F.3d 873, 2002 FED App. 0028P (6th Cir. 2002).

[14] Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

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16B Am. Jur. 2d Constitutional Law § 969

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

a. Persons and Agencies Bound

§ 969. Private persons as bound by substantive due process—Specific private persons or organizations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3941 to 3945

As examples of the principles regarding the application of the due-process limitations upon the powers of governments and their agencies and not upon private persons,[1] specific private persons and organizations that have been found not subject to the Due Process Clauses because they are not "state actors" have included:

- a private accreditation agency that made the decision to remove accreditation from a college[2]
- a testing service whose standardized test is a prerequisite to admission to nearly all law schools[3]
- a nuclear power plant owner and operator[4]
- a military contractor[5]
- an automobile insurer[6]
- a private charitable organization which provided financial assistance and a variety of other services to refugees seeking to emigrate to the United States[7]
- a volunteer first-aid squad which treated a person injured during an arrest by a police officer[8]
- a private university[9]
- the National Collegiate Athletic Association (NCAA)[10]
- a private moneylender[11]
- a wife in a domestic violence case[12]
- a railroad which conducted a grievance proceeding following dismissal of a railroad employee[13]
- a transport workers union[14]
- a state-chartered mutual savings and loan association[15]
- an Indian tribe exercising police powers[16]

- private security officers hired by concert promoters to conduct preconcert pat-down searches at a public university auditorium[17]

Footnotes

1 § 968.

2 Hiwassee College, Inc. v. Southern Association Of Colleges And Schools, 531 F.3d 1333, 234 Ed. Law Rep. 595 (11th Cir. 2008).

3 Johnson v. Educational Testing Service, 754 F.2d 20, 37 Ed. Law Rep. 30 (1st Cir. 1985).

4 Baldwin v. Pilgrim Nuclear Power Station, 529 F. Supp. 2d 204 (D. Mass. 2008).

5 James v. ServiceSource, Inc., 555 F. Supp. 2d 628 (E.D. Va. 2008).

6 Vintilla v. Safeco Ins. Co., 417 F. Supp. 2d 922 (N.D. Ohio 2006), decision aff'd, 219 Fed. Appx. 413, 2007 FED App. 0175N (6th Cir. 2007).

7 Nguyen v. U.S. Catholic Conference, 719 F.2d 52 (3d Cir. 1983).

8 Groman v. Township of Manalapan, 47 F.3d 628 (3d Cir. 1995).

9 Doe v. University of Denver, 952 F.3d 1182 (10th Cir. 2020); Doe v. Allee, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d 109, 361 Ed. Law Rep. 814 (2d Dist. 2019).

10 Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019, 20 Ed. Law Rep. 1120 (4th Cir. 1984).

11 Rank v. Nimmo, 677 F.2d 692 (9th Cir. 1982); Faith Cathedral Church of God in Christ v. Booker T. Washington Ins. Co., Inc., 481 So. 2d 369 (Ala. 1985).
A credit union which allegedly transferred money from its customers' account without their consent was not a state actor for purposes of the customer's claim for a violation of due process under the 14th Amendment. Smith v. Delaware First Federal Credit Union, 395 F. Supp. 2d 127 (D. Del. 2005).

12 Kelm v. Hyatt, 44 F.3d 415, 1995 FED App. 0025P (6th Cir. 1995).

13 Elmore v. Chicago & Illinois Midland Ry. Co., 782 F.2d 94 (7th Cir. 1986).

14 Carter v. Transport Workers Union of America Local 556, 353 F. Supp. 3d 556 (N.D. Tex. 2019).

15 Simpson v. Office of Thrift Supervision, 29 F.3d 1418 (9th Cir. 1994).

16 Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980).

17 Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 98 Ed. Law Rep. 639 (10th Cir. 1995).

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16B Am. Jur. 2d Constitutional Law § 970

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

b. Persons Protected

§ 970. Persons protected by substantive due process, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3920 to 3932

The guarantee of due process of law inures to the benefit of persons who are citizens of the United States or of the state in which the question arises.[1] It is not, however, limited to such citizens. Instead, the guarantee is universal in its application to all persons within the territorial jurisdiction of a state or the United States without regard to any differences of race, color, or nationality[2] when they have come within the territory of the United States and developed substantial connections with this country.[3] By their terms, federal and state constitutional guarantees of due process extend to "persons."[4]

The Due Process Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security for those persons it protects. It forbids the state to deprive an individual's life, liberty, or property without due process of law, but its language cannot be fairly extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.[5] There are two exceptions, however, to the general rule that the state is not constitutionally obligated under the Due Process Clause to protect individuals against private violence,[6] and they are (1) the special-relationship doctrine,[7] and (2) the state-created or enhanced danger doctrine,[8] under which the Due Process Clause imposes a duty on the state to protect the plaintiff from third parties when the state affirmatively places the plaintiff in danger.[9] That is, exceptions to the rule apply when (1) a state has custody of a person in need or some other "special relationship" that heightens its responsibility to care for a particular citizen, or (2) when a state actor acts affirmatively to create or greatly increases a risk of harm to citizens.[10] An affirmative duty on the part of a state actor to protect arises not from knowledge of an individual's predicament or from expressions of intent to help him or her,[11] but from the limitations such as imprisonment, institutionalization, or other similar restraint of personal liberty imposed by the state which prevent an individual from acting on his own behalf.[12] Generally, to establish a substantive due-process violation under the state-created danger doctrine, plaintiffs must establish that (1) the harm ultimately caused to plaintiff was foreseeable and fairly direct, (2)

the state actor acted in willful disregard for the plaintiff's safety, (3) there was some relationship between the state and the plaintiff, and (4) the state actor used his or her authority to create an opportunity for danger that otherwise would not have existed.[13] Under a different formulation of the rule, to establish the state-created danger exception, plaintiff must show that (1) the charged state actors created the danger or increased the plaintiff's vulnerability to the danger in some way; (2) the plaintiff was a member of a limited and specifically definable group; (3) the defendants' conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) the defendants acted recklessly in conscious disregard of that risk; and (6) the conduct, when viewed in total, shocks the conscience.[14]

Observation:

It has been said that the level of culpability required to sustain a due-process claim based on a state-created danger theory depends on the particular circumstances of the case; where state officials are asked to make split-second decisions in a hyperpressurized environment, an intent to cause harm is usually required. By contrast, where officials are afforded the luxury of a greater degree of deliberation and have time to make unhurried judgments, *deliberate indifference* is sufficient to support an allegation of culpability.[15]

CUMULATIVE SUPPLEMENT

Cases:

To prove a due process claim under state-created-danger exception to the prohibition against holding public officials constitutionally responsible for private acts of violence, an official must initially take an affirmative act that either creates or increases the risk that the plaintiff will be exposed to private acts of violence, the risk of private acts of violence must rise to the level of a special danger to a specific victim that exceeds the general risk of harm the public faces from the private actor, and, when exacerbating this risk of harm, the official must act with a sufficiently culpable state of mind. U.S. Const. Amend. 14. Barefield v. Hillman, 475 F. Supp. 3d 794 (M.D. Tenn. 2020).

[END OF SUPPLEMENT]

Footnotes

1 In re Schott, 16 Ohio App. 2d 72, 45 Ohio Op. 2d 168, 241 N.E.2d 773 (1st Dist. Hamilton County 1968).

2 Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953).
The Due Process Clauses of the Fifth and 14th Amendments are directed at the protection of the individual, and he or she is entitled to the immunity that these clauses give as much against the state as against the national government. Curry v. McCanless, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A.L.R. 162 (1939).

3 U.S. v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).
All individuals in the United States, citizens and aliens alike, are protected by the Due Process Clause. U.S. v. Calderon-Segura, 512 F.3d 1104, 75 Fed. R. Evid. Serv. 647 (9th Cir. 2008).
A citizen of a foreign state without property or presence in this country has no constitutional rights under the Due Process Clause or otherwise; however, aliens who have come within the territory of the United States and developed

substantial connections with this country are entitled to constitutional protections. Al-Aqeel v. Paulson, 568 F. Supp. 2d 64 (D.D.C. 2008).

[4] South Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (noting that a state of the United States is not a "person" for the purposes of the due-process guarantee of the Fifth Amendment).
As to the protection provided to states and political subdivisions, generally, see § 972.

[5] Collins v. City of Harker Heights, Tex., 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); Neiberger v. Hawkins, 239 F. Supp. 2d 1140 (D. Colo. 2002).

[6] Niziol v. Pasco County Dist. School Bd., 240 F. Supp. 2d 1194, 174 Ed. Law Rep. 208 (M.D. Fla. 2002).
For purposes of the private violence requirement of a state-created danger claim under the Fourteenth Amendment, at a minimum, the term "violence" in its legal sense typically connotes some degree of deliberateness. Kerns v. Independent School Dist. No. 31 of Ottawa County, 44 F. Supp. 3d 1110, 314 Ed. Law Rep. 437 (N.D. Okla. 2014).

[7] Niziol v. Pasco County Dist. School Bd., 240 F. Supp. 2d 1194, 174 Ed. Law Rep. 208 (M.D. Fla. 2002).
A special relationship between an ex-wife and a county did not arise under due-process principles when the ex-wife obtained an ex parte order of protection against her ex-husband so as to create a duty on the part of the county to protect the ex-wife from her ex-husband in that the county did not act affirmatively to restrain the ex-wife from acting for herself; therefore, the failure of the county sheriff's department to serve the ex-husband with the order in a timely manner did not violate the substantive due-process rights of the ex-wife, who suffered serious injury when her ex-husband shot her. Jones v. Union County, TN, 296 F.3d 417, 2002 FED App. 0235P (6th Cir. 2002).

[8] Niziol v. Pasco County Dist. School Bd., 240 F. Supp. 2d 1194, 174 Ed. Law Rep. 208 (M.D. Fla. 2002).

[9] Henry A. v. Willden, 678 F.3d 991 (9th Cir. 2012).
The Due Process Clause protects against deliberately wrongful government decisions rather than merely negligent government conduct. Saenz v. Lovington Mun. School Dist., 105 F. Supp. 3d 1271, 324 Ed. Law Rep. 910 (D.N.M. 2015).

[10] Vidovic v. Mentor City School Dist., 921 F. Supp. 2d 775, 294 Ed. Law Rep. 906 (N.D. Ohio 2013).

[11] O'Grady v. City of Ballwin, 866 F. Supp. 2d 1073 (E.D. Mo. 2012).

[12] Connor B. ex rel. Vigurs v. Patrick, 774 F.3d 45 (1st Cir. 2014); O'Grady v. City of Ballwin, 866 F. Supp. 2d 1073 (E.D. Mo. 2012).

[13] Customers Bank v. Municipality of Norristown, 942 F. Supp. 2d 534 (E.D. Pa. 2013), aff'd, 563 Fed. Appx. 201 (3d Cir. 2014).
For a generally similar but more elaborate statement of these elements, see Moore v. Richman, 797 F. Supp. 2d 572 (W.D. Pa. 2011).

[14] Harper v. Carbon County School Dist., 105 F. Supp. 3d 1317, 324 Ed. Law Rep. 956 (D. Utah 2015).

[15] Van Orden v. Borough of Woodstown, 5 F. Supp. 3d 676 (D.N.J. 2014).

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16B Am. Jur. 2d Constitutional Law § 971

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

b. Persons Protected

§ 971. Particular persons as protected by substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3920 to 3932

In terms of the application of the Due Process Clauses to specific individuals or entities, due-process protection extends to:
• aliens[1] present in the United States,[2] whether their presence is lawful, unlawful, temporary, or permanent[3]
• attorneys[4]
• indigents[5]
• licensees[6]
• mental incompetents[7]
• military personnel[8]
• minors[9]
• parolees[10]
• pretrial detainees[11]
• prisoners,[12] although the protection extended to them is significantly less than that guaranteed to free persons[13]
• private associations or societies and their members[14]
• private corporations[15]
• public employees,[16] with certain exceptions[17]
• tenants[18]
On the other hand, as used in the 14th Amendment, the word "person" does not include the unborn.[19] In addition, foreign states are not "persons" protected by the Fifth Amendment.[20] Similarly, Mexican state-owned banks are not "persons" within the scope of the Due Process Clause.[21]

Footnotes

[1] Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. 2003); Capric v. Ashcroft, 355 F.3d 1075 (7th Cir. 2004); Padilla v. Immigration and Customs Enforcement, 953 F.3d 1134 (9th Cir. 2020).
The Fifth Amendment entitles aliens to due process of law in deportation proceedings, and detention during such proceedings is a constitutionally valid aspect of the deportation process. Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003).

[2] Padilla v. Immigration and Customs Enforcement, 953 F.3d 1134 (9th Cir. 2020).
Cuban migrants who found temporary sanctuary on an abandoned lighthouse off the shore of Florida were not "present" in the United States under the Immigration and Nationality Act (INA), and thus the Due Process Clause did not apply to them, since the lighthouse did not constitute dry land under the INA, for which the migrants' presence on would have rendered them applicants for admission. Movimiento Democracia, Inc. v. Secretary, Department of Homeland Security, 720 Fed. Appx. 545 (11th Cir. 2017).

[3] K.M.H.C. v. Barr, 2020 WL 614035 (S.D. Cal. 2020); Basank v. Decker, 2020 WL 1481503 (S.D. N.Y. 2020).

[4] In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).
Because of the severity of the sanctions available for violations of the disciplinary rules, an attorney's due-process rights must be carefully balanced against the importance of the public interest in expeditiously resolving complaints of misconduct. Disciplinary Counsel v. Heiland, 116 Ohio St. 3d 521, 2008-Ohio-91, 880 N.E.2d 467 (2008).
As to notice and an opportunity to be heard in disciplinary proceedings against an attorney, generally, see Am. Jur. 2d, Attorneys at Law § 105.

[5] Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).
An individual receiving federal welfare assistance has a statutorily created property interest, for purposes of the Due Process Clause, in the continued receipt of those benefits. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999).

[6] Club Misty, Inc. v. Laski, 208 F.3d 615 (7th Cir. 2000) (liquor license).

[7] Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Com. v. Travis, 372 Mass. 238, 361 N.E.2d 394 (1977).
The state's requiring an insanity acquittee to prove both a lack of present mental illness and dangerousness in order to obtain unconditional release violated the substantive protections of the Due Process Clause. Revels v. Sanders, 519 F.3d 734 (8th Cir. 2008).
Due process of law is violated if the state or federal governments try as a criminal a person who is insane and incompetent to stand trial. Bishop v. U.S., 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956); U. S. ex rel. Rizzi v. Follette, 367 F.2d 559 (2d Cir. 1966).
Sanity hearings will violate due process of law when they are not procedurally fair to the accused. People v. Bender, 20 Ill. 2d 45, 169 N.E.2d 328 (1960).

[8] Am. Jur. 2d, Military and Civil Defense § 208.

[9] McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); Nicini v. Morra, 212 F.3d 798 (3d Cir. 2000); Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 1999 FED App. 0162P (6th Cir. 1999); In re Roger S., 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977); In re K.M., 2018 IL App (1st) 172349, 426 Ill. Dec. 930, 117 N.E.3d 347 (App. Ct. 1st Dist. 2018); In re T.M., 2016-Ohio-8425, 78 N.E.3d 349 (Ohio Ct. App. 11th Dist. Geauga County 2016); In re F.C. III, 607 Pa. 45, 2 A.3d 1201 (2010).
As to the due-process protection afforded minors with respect to juvenile court statutes, see Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children § 17.

[10] Hamilton v. Keiter, 16 Ohio Misc. 260, 45 Ohio Op. 2d 285, 241 N.E.2d 296 (C.P. 1968) (holding that a convicted parolee is a person within the 14th Amendment regardless of his or her status as a citizen and is entitled to the protection of the Due Process Clause).

[11] Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); Mosher v. Nelson, 589 F.3d 488 (1st Cir. 2009); Ford v. Nassau County Executive, 41 F. Supp. 2d 392 (E.D. N.Y. 1999).
Under the Due Process Clause of the 14th Amendment, a city was required to provide to a pretrial detainee humane conditions of confinement by ensuring the basic necessities of adequate food, clothing, shelter, and medical care and by taking reasonable measures to guarantee his safety. Ledbetter v. City of Topeka, Kan., 318 F.3d 1183 (10th Cir. 2003).

[12] Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Scruggs v. Jordan, 485 F.3d 934 (7th Cir. 2007); Felton v. Lincoln, 429 F. Supp. 2d 226 (D. Mass. 2006); Briggs v. Kempf, 146 Idaho 172, 191 P.3d 250 (Ct. App. 2008).
A reasonable entitlement of prison inmates to due-process protection is not created whenever a state provides for the possibility of release upon parole, the possibility providing no more than a mere hope that the benefit will be obtained, but the expectancy of release provided in a state statute mandating the release of an eligible inmate unless the state parole board concludes that the inmate's release should be deferred for at least one of four specified reasons is entitled to some measure of protection under the Due Process Clause of the 14th Amendment. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).
The denial or undue restriction of the fundamental right of reasonable access to the courts is a denial of due process of law guaranteed to state prison inmates by the 14th Amendment. People v. Wells, 261 Cal. App. 2d 468, 68 Cal. Rptr. 400 (3d Dist. 1968) (disapproved of on other grounds by, People v. Barnum, 29 Cal. 4th 1210, 131 Cal. Rptr. 2d 499, 64 P.3d 788 (2003)).

[13] Estate of DiMarco v. Wyoming Dept. of Corrections, Div. of Prisons, 473 F.3d 1334 (10th Cir. 2007).
While inmates retain rights under the Due Process Clause of the United States and Kentucky Constitutions, a defendant in a prison disciplinary proceeding is not entitled to the full panoply of rights due a defendant in a criminal proceeding. Lee v. Haney, 517 S.W.3d 500 (Ky. Ct. App. 2017).

[14] Am. Jur. 2d, Associations and Clubs § 21.

[15] Am. Jur. 2d, Corporations § 66.

[16] Brown v. City of Niota, Tenn., 214 F.3d 718, 2000 FED App. 0180P (6th Cir. 2000); Humberson v. U.S. Attorney's Office for Dist. of Columbia, 236 F. Supp. 2d 28 (D.D.C. 2003), aff'd, 2003 WL 21768064 (D.C. Cir. 2003); Moreland v. Miami-Dade County, 255 F. Supp. 2d 1304 (S.D. Fla. 2002); Cinaglia v. Levin, 258 F. Supp. 2d 390 (D.N.J. 2003); Munno v. Town of Orangetown, 391 F. Supp. 2d 263 (S.D. N.Y. 2005); Medina Diaz v. Gonzalez Rivera, 371 F. Supp. 2d 77 (D.P.R. 2005); Mays v. City of Los Angeles, 43 Cal. 4th 313, 74 Cal. Rptr. 3d 891, 180 P.3d 935 (2008); Orix Capital Markets, LLC v. American Realty Trust, Inc., 356 S.W.3d 748 (Tex. App. Dallas 2011) (judges).

[17] Bolduc v. Town of Webster, 629 F. Supp. 2d 132 (D. Mass. 2009).

[18] Thomas v. Cohen, 304 F.3d 563, 2002 FED App. 0287P (6th Cir. 2002) (holding that tenants had a due-process right to predeprivation process prior to eviction, even if postdeprivation remedies were available under state law, absent a showing of exigent circumstances that made the predeprivation process impractical).

[19] Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)); Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974); Coe v. County of Cook, 162 F.3d 491 (7th Cir. 1998).

[20] Waldman v. Palestine Liberation Organization, 835 F.3d 317 (2d Cir. 2016), cert. denied, 138 S. Ct. 1438, 200 L. Ed. 2d 716 (2018); Livnat v. Palestinian Authority, 851 F.3d 45 (D.C. Cir. 2017), cert. denied, 139 S. Ct. 373, 202 L. Ed. 2d 301 (2018).

[21] Cruz v. U.S., 387 F. Supp. 2d 1057 (N.D. Cal. 2005).

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16B Am. Jur. 2d Constitutional Law § 972

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XIV. Due Process of Law

B. Nature and Scope of Guarantee

4. Persons and Agencies Affected

b. Persons Protected

§ 972. States and political subdivisions as protected by substantive due process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3928 to 3930

Although there is some authority referring to the rights of a state under the Due Process Clause,[1] the Supreme Court and other courts have expressly acknowledged that a state is not a "person" for the purposes of the Due Process Clause of the Fifth Amendment.[2] Likewise, municipalities are not persons possessed of rights under the Due Process Clause.[3] Generally, so far as the state and its instrumentalities are concerned, there is no scope for invoking the due-process guarantee as against the action of the state itself.[4] However, in the application of this rule to municipalities, the question depends upon the view taken in the particular jurisdiction as to the rights of a municipal government; in a majority of states, the right of the people of a municipality to control its affairs is not considered as an inherent right residing in the people but as dependent for its existence on the legislative will.[5] In such jurisdictions, the state has a power over the rights and properties of municipalities which is unrestricted by the due-process guarantee.[6] The same rule applies to townships[7] and to counties.[8]

In jurisdictions in which the right to local self-government is treated as a right inherent in cities and towns and one which, if not surrendered on the adoption of the state constitution, cannot be taken away by the legislature, the due-process guarantee may apply to municipal corporations, at least as to their proprietary functions.[9] The right of home rule by cities has been established in a number of states by constitutional provision.[10] A home-rule city is protected by the due-process guarantee.[11]

CUMULATIVE SUPPLEMENT

Cases:

A county has no constitutional right to due process. U.S. Const. Amend. 14. In re Claim of Roberts for Attorney Fees, 307 Neb. 346, 949 N.W.2d 299 (2020).

[END OF SUPPLEMENT]

Footnotes

[1] State, by Peterson v. Anderson, 220 Minn. 139, 19 N.W.2d 70 (1945) (finding that the state has a due-process right to interpose and file answers alleging that there was no taking of or damage to the land of persons permitted to intervene in condemnation proceeding instituted by the state).

[2] South Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966); Connecticut Dept. of Social Services v. Leavitt, 428 F.3d 138 (2d Cir. 2005); State of Pa. v. Riley, 84 F.3d 125, 109 Ed. Law Rep. 614 (3d Cir. 1996); Premo v. Martin, 119 F.3d 764 (9th Cir. 1997); State of Ala. v. U.S. E.P.A., 871 F.2d 1548 (11th Cir. 1989).
Due process protects individuals, not the state, from arbitrary governmental restrictions on property and liberty interests. People In Interest of A.C.E-D., 2018 COA 157, 433 P.3d 153 (Colo. App. 2018).

[3] City of East St. Louis v. Circuit Court for Twentieth Judicial Circuit, St. Clair County, Ill., 986 F.2d 1142, 24 Fed. R. Serv. 3d 1383 (7th Cir. 1993); Taha v. Bucks County Pennsylvania, 408 F. Supp. 3d 628 (E.D. Pa. 2019); State v. City of Birmingham, 2019 WL 6337424 (Ala. 2019).

[4] Bibb County v. Hancock, 211 Ga. 429, 86 S.E.2d 511 (1955); City of Gary v. Smith & Wesson Corp., 126 N.E.3d 813 (Ind. Ct. App. 2019), transfer denied, 138 N.E.3d 953 (Ind. 2019); C.S. v. J.C., 2017-Ohio-8794, 101 N.E.3d 84 (Ohio Ct. App. 12th Dist. Fayette County 2017) (county family services department); State, Department of Game, Fish and Parks v. Troy Township, Day County, 2017 SD 50, 900 N.W.2d 840 (S.D. 2017).
Political subdivisions of the state may not challenge the validity of a state statute under the 14th Amendment. City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973).
A governmental agency which is not authorized to hold property in a private sense is not deprived of property without due process of law by a statute providing for the extinguishment of its title to land. Fahey v. O'Melveny & Myers, 200 F.2d 420 (9th Cir. 1952).

[5] Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 107.

[6] City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471 (1923) (interference with the right of a municipality to take water from a public stream).

[7] Soliah v. Heskin, 222 U.S. 522, 32 S. Ct. 103, 56 L. Ed. 294 (1912).

[8] White v. White, 293 Neb. 439, 884 N.W.2d 1 (2016); State v. Pierce County, 132 Wash. 155, 231 P. 801, 46 A.L.R. 594 (1925).
A county could not challenge as vague, under the Due Process Clause, a statute that required competitive bidding on contracts of more than $5,000 in counties within a certain size range with charter governments; political subdivisions, such as counties, are not persons within the protection of the Due Process Clause. Jackson County v. State, 207 S.W.3d 608 (Mo. 2006).
Neither counties nor municipal corporations are persons as against the state within the meaning of the constitutional provision guaranteeing due process to all persons. Bibb County v. Hancock, 211 Ga. 429, 86 S.E.2d 511 (1955).
The state may impose upon a county the cost of maintaining its harmless insane when the insane persons themselves or their relatives are not able to do so even though the county is not made a party to the proceedings in which the necessary facts are determined. Town of Brighton v. Town of Charleston, 114 Vt. 316, 44 A.2d 628 (1945).

[9] State ex rel. Kern v. Arnold, 100 Mont. 346, 49 P.2d 976, 100 A.L.R. 1071 (1935); People ex rel. Rodgers v. Coler, 166 N.Y. 1, 59 N.E. 716 (1901).

[10] Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 108.

[11] State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581 (1935) (holding that a statute making it compulsory upon cities and towns to ensure their public buildings and property in a state insurance fund violates the due process and home-rule provisions of the state constitution).

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16B Am. Jur. 2d Constitutional Law XIV C Refs.

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XIV. Due Process of Law

C. Notice

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Research References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3878 to 3881, 3953, 3973 to 3978

A.L.R. Library

A.L.R. Index, Due Process
A.L.R. Index, Fifth Amendment
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16B Am. Jur. 2d Constitutional Law § 973

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XIV. Due Process of Law

C. Notice

1. In General

§ 973. Necessity of notice as element of due process, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3878 to 3881, 3953, 3973 to 3978

As a matter of due process, parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified.[1] Consequently, notice is an essential element of due process[2] and the failure to give notice violates the most rudimentary demands of due process of law[3] inasmuch as the right to be heard, ensured by the guarantee of due process, has little reality or worth unless one is informed that a matter is pending and can choose whether to appear or default, acquiesce, or contest.[4]

Observation:

A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful[5] and to prevent arbitrary or unfair deprivations.[6] Specifically, the purpose of the notice requirement of due process is to apprise interested parties of the pendency of the action,[7] to permit adequate preparation for the impending hearing,[8] to state the time, place, and purpose of the hearing to persons entitled to notice so that parties may attend the hearing,[9] and to afford them an opportunity to present their objections.[10]

The Due Process Clause requires at a minimum that any deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case.[11] The procedural due process requirement of

notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions but the fair process of decision making that such requirement guarantees works, by itself, to protect against any arbitrary deprivation of property.[12] The due process requirement of the 14th Amendment as to notice do not depend on the classification of actions as in rem or in personam.[13] A violation of a person's right of due process by failing to give him or her notice of the pendency of proceedings is not cured by granting the person a hearing on his or her motion to set aside the decree.[14]

Absent some exigent or other extraordinary circumstances, a court may not award equitable relief without first providing all affected parties actual notice that it is contemplating a remedial action and affording them a meaningful chance to be heard; the fact that a court enjoys broad discretion in shaping solutions does not relieve it from its obligation to afford procedural due process to all parties in interest.[15] This is especially true in proceedings of a judicial nature affecting the property rights of citizens;[16] some form of notice and hearing is required.[17] Notice and an opportunity to be heard are also essential on the basis of procedural due process where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him or her,[18] although reputation alone is not an interest protected by the Due Process Clause.[19]

Practice Tip:

The United States Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.[20]

A court violates a party's due process rights by expanding the scope of a hearing without proper notice.[21]

Generally, due process requires notice of certain proceedings after the initiation of a lawsuit.[22]

Footnotes

1 BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); In re DeLeon J., 290 Conn. 371, 963 A.2d 53 (2009); Smith v. State, 297 Ga. App. 300, 676 S.E.2d 750 (2009), judgment aff'd, 286 Ga. 409, 688 S.E.2d 348 (2010).
Hearing, generally, see §§ 987 to 1017.
Procedural due process requires an opportunity to be heard, in addition to notice of the pendency of an action, and in conjunction therewith, adequate notice of the hearing is fundamental. Dehart v. Jones, 269 So. 3d 801 (La. Ct. App. 3d Cir. 2019).
A state court's holding that a default judgment must stand absent a showing of a meritorious defense where the judgment was entered without proper notice and with substantial adverse consequences to the party in default, is infirm under the Due Process Clause of the 14th Amendment. Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988).

2 BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594 (1st Cir. 1995); Artway v. Attorney General of State of N.J., 81 F.3d 1235 (3d Cir. 1996); McDonald v. City of Corinth, Tex., 102 F.3d 152 (5th Cir. 1996); Arch of Kentucky, Inc. v. Director, Office of Workers' Compensation Programs, 556 F.3d 472 (6th Cir. 2009); Marler v. Missouri State Bd. of Optometry, 102 F.3d 1453 (8th Cir. 1996); Martinez v. McAleenan, 385 F. Supp. 3d 349 (S.D. N.Y. 2019), appeal withdrawn, 2019 WL 7944831 (2d Cir. 2019) (key element); Bluitt v. Houston Independent School Dist., 236 F. Supp. 2d 703 (S.D. Tex. 2002); Doe v. California Dept. of Justice, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (4th Dist. 2009); People ex rel. Birkett v. Konetski, 233 Ill. 2d 185, 330 Ill. Dec. 761, 909 N.E.2d 783 (2009); In re Robert S., 2009 ME 18, 966 A.2d 894 (Me. 2009); Burns v. State, 2019 OK CR 27, 453 P.3d 1244 (Okla. Crim. App. 2019) (basic requirement); Davis v. Blumenstein, 7 Wash. App. 2d 103, 432 P.3d 1251 (Div. 1 2019).
The right of prior notice is central to the United States Constitution's command of due process. U.S. v. James Daniel

Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).
Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure as required under procedural due process. Matter of Duvall, 834 S.E.2d 177 (N.C. Ct. App. 2019).

[3] Franzblau Dratch, PC v. Martin, 452 N.J. Super. 486, 175 A.3d 973 (App. Div. 2017); Interest of T.M.E., 565 S.W.3d 383 (Tex. App. Texarkana 2018).

[4] Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); Martinez v. McAleenan, 385 F. Supp. 3d 349 (S.D. N.Y. 2019), appeal withdrawn, 2019 WL 7944831 (2d Cir. 2019); Sapp v. Wilkie, 32 Vet. App. 125 (2019); In re Marriage of Burns and Lifferth, 2019 IL App (2d) 180715, 431 Ill. Dec. 867, 128 N.E.3d 1037 (App. Ct. 2d Dist. 2019).
The right to a hearing is meaningless without notice. Jackson v. Commissioner of Human Services, 933 N.W.2d 408 (Minn. 2019).
In the absence of effective notice, the other due process rights, such as the right to a timely hearing, are rendered fundamentally hollow. Nnebe v. Daus, 931 F.3d 66 (2d Cir. 2019).

[5] City of West Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).

[6] Qadan v. Florida Property Group Associates, Inc., 591 B.R. 796 (M.D. Fla. 2018).

[7] Farina v. Metropolitan Transportation Authority, 409 F. Supp. 3d 173 (S.D. N.Y. 2019).
Form and contents of notice, see §§ 977 to 980.

[8] Watkins v. Greene Metropolitan Housing Authority, 397 F. Supp. 3d 1103 (S.D. Ohio 2019).
Notice, as required by due process clause, ensures that each party is provided adequate opportunity to prepare and thereafter advocate its position, ultimately exposing all relevant factors from which the finder of fact may make an informed judgment. S.T. v. R.W., 2018 PA Super 192, 192 A.3d 1155 (2018).
Part of the function of notice, as required by due process, is to give the charged party a chance to marshal the facts in his defense. Nnebe v. Daus, 931 F.3d 66 (2d Cir. 2019).

[9] Waveland Drilling Partners III-B, LP v. New Dominion, LLC, 2019 OK CIV APP 8, 435 P.3d 114 (Div. 3 2018).
Time of notice, see §§ 981, 982.

[10] Farina v. Metropolitan Transportation Authority, 409 F. Supp. 3d 173 (S.D. N.Y. 2019).

[11] Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); Gissendaner v. Commissioner, Georgia Dept. of Corrections, 794 F.3d 1327 (11th Cir. 2015); West v. Kentucky Horse Racing Commission, 2019 WL 6053014 (E.D. Ky. 2019); DeNardo v. Maassen, 200 P.3d 305 (Alaska 2009); Adair Asset Management, LLC/US Bank v. Honey Bear Lodge, Inc., 138 So. 3d 6 (La. Ct. App. 1st Cir. 2014).

[12] Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

[13] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

[14] Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) (adoption proceedings).

[15] E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594 (1st Cir. 1995).

[16] Dusenbery v. U.S., 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002); People v. Hernandez, 172 Cal. App. 4th 715, 91 Cal. Rptr. 3d 604 (4th Dist. 2009).
Before forcing a citizen to satisfy debt by forfeiting his or her property, due process requires the government to provide adequate notice of the impending taking. Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

[17] In re Energy Future Holdings Corp, 949 F.3d 806 (3d Cir. 2020); Vaquero Energy, Inc. v. County of Kern, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (5th Dist. 2019), review filed, (Dec. 30, 2019) and review denied, (Feb. 26, 2020).

[18] Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971); Kiser v. Lowe, 236 F. Supp. 2d 872 (S.D. Ohio 2002); University of Texas Medical School at Houston v. Than, 901 S.W.2d 926, 101 Ed. Law Rep. 1251 (Tex. 1995).
Disbarment is a penalty imposed upon a lawyer, and he or she is accordingly entitled to procedural due process, which

includes a fair notice of the charge. In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

19 Kelly v. Borough of Sayreville, N.J., 107 F.3d 1073 (3d Cir. 1997) (holding that a plaintiff complaining that his or her liberty interest in his or her reputation has been injured states an actionable claim under the 14th Amendment only if he or she has suffered an additional deprivation); Olivieri v. Rodriguez, 122 F.3d 406, 38 Fed. R. Serv. 3d 744 (7th Cir. 1997).
Neither harm to one's reputation nor the consequent impairment of future employment opportunities is constitutionally cognizable injuries. Vander Zee v. Reno, 73 F.3d 1365 (5th Cir. 1996).

20 Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).
When the police seize property for a criminal investigation, due process does not require them to provide the owner with notice of state law remedies which are established by published, generally available state statutes and case law. City of West Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999).

21 Carson-Grayson v. Grayson, 247 So. 3d 675 (Fla. 5th DCA 2018).

22 Seleme v. JP Morgan Chase Bank, 982 N.E.2d 299 (Ind. Ct. App. 2012).

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16B Am. Jur. 2d Constitutional Law § 974

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XIV. Due Process of Law

C. Notice

1. In General

§ 974. Character or type of notice required to satisfy due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953

Notice by mail or other means that is certain to ensure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect a liberty or property interest of any party.[1] Certified mail service of process sent to a business address comports with due process provided circumstances are such that successful notification could be reasonably anticipated.[2] However, under most circumstances, notice sent by ordinary mail is sufficient to discharge the government's due process obligations.[3]

Service by e-mail alone comports with due process where a plaintiff can demonstrate that the e-mail is likely to reach the defendant.[4] Service by email on foreign defendants is also a permissible means of service, consistent with due process.[5] However, an employer's e-mail to an employee stating that the employer intended to file a lawsuit later that day, and attaching the pleadings which the employer intended to file, did not constitute sufficient notice of the commencement of an action and thus would violate due process in the absence of an applicable exception to the notice requirement.[6]

Observation:

Improvements in the reliability of new notice procedures adopted by the government does not necessarily demonstrate the infirmity for purposes of the Due Process Clauses of those that have been replaced.[7]

Footnotes

[1] Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991); Matter of 1977 Mercury Coupe, I.D. No. 7A93S623012, License No. 300TMI (CA), 129 Ariz. 378, 631 P.2d 533 (1981); Silverstein v. Minkin, 49 N.Y.2d 260, 425 N.Y.S.2d 88, 401 N.E.2d 210 (1980).

[2] Wright v. Mirza, 2017-Ohio-7183, 95 N.E.3d 1108 (Ohio Ct. App. 1st Dist. Hamilton County 2017), appeal not allowed, 152 Ohio St. 3d 1410, 2018-Ohio-723, 92 N.E.3d 880 (2018).
When unclaimed certified mail represents the government's first attempt at notice, it must take additional reasonable steps to notify the interested party. Ming Kuo Yang v. City of Wyoming, Michigan, 793 F.3d 599 (6th Cir. 2015).

[3] Nelson v. City of New York, 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956) (finding that notice by mail will be a reasonable form of substituted notice in many instances); Armendariz-Mata v. U.S. Dept. of Justice, Drug Enforcement Admin., 82 F.3d 679 (5th Cir. 1996).

[4] Ferrarese v. Shaw, 164 F. Supp. 3d 361 (E.D. N.Y. 2016).

[5] Korea Deposit Insurance Corporation v. Jung, 59 Misc. 3d 442, 68 N.Y.S.3d 625 (Sup 2017) (under New York law and where the methods prescribed by or compatible with the law of defendants' country have proved ineffective).
Substituted service on a defendant in a defamation case by email would comport with due process where the defendant's on-line activities were the factual heart of the lawsuit, the plaintiff had been unable to locate the defendant, the defendant represented that he was permanently domiciled in an unspecified country outside the United States, and the defendant had acknowledged the receipt of the filings in the suit at his email address. Neumont University, LLC v. Nickles, 304 F.R.D. 594 (D. Nev. 2015).

[6] Vickery v. Ardagh Glass Inc., 85 N.E.3d 852 (Ind. Ct. App. 2017), transfer denied, 98 N.E.3d 71 (Ind. 2018).

[7] Dusenbery v. U.S., 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

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16B Am. Jur. 2d Constitutional Law § 975

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XIV. Due Process of Law

C. Notice

1. In General

§ 975. Language required in notice to satisfy due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

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Providing a notice written in the English language is normally deemed sufficient.[1] To satisfy the constitutional requirement of due process, the notice afforded should, of course, be such as is likely to be received and plainly understood,[2] although it need not be in a foreign language.[3]

Caution:

It has been held that notice, as required to satisfy due process, is ineffective if it is delivered in a language that is incomprehensible to the recipient.[4]

Footnotes

[1] Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983).
A publication in English of actions designed to effect changes in the zoning map created by a Special Manhattan Bridge District in the Chinatown district of Manhattan in obscure city publications did not fail to give notice to the

community, which was basically Chinese-speaking, and did not violate due process, since it constituted implementation in accord with the municipal ordinance, and since the notice, published in English in the specified publications in conformity with the guidelines, met the statutory requirement in that English is the national language, and it is appropriate that notices required by law be published in that language. Lai Chun Chan Jin v. Board of Estimate of City of New York, 92 A.D.2d 218, 460 N.Y.S.2d 28 (1st Dep't 1983), order aff'd, 62 N.Y.2d 900, 478 N.Y.S.2d 859, 467 N.E.2d 523 (1984).

[2] Griffin v. Cook County, 369 Ill. 380, 16 N.E.2d 906, 118 A.L.R. 1157 (1938).

[3] Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (finding that the fact that all notices of rights under California unemployment laws are in English, with no provision for notices in Spanish for people who speak, read, and write Spanish only, is not a denial of due process).

[4] Ramirez v. Young, 906 F.3d 530 (7th Cir. 2018).

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XIV. Due Process of Law

C. Notice

1. In General

§ 976. Sufficiency of notice to meet due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3975

Forms

Forms relating to class action notice, generally, see Am. Jur. Pleading and Practice Forms, Parties [Westlaw®(r) Search Query]

To meet the requirements of due process, the notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.[1] A notice that is constitutionally sufficient is such as one desirous of actually informing the interested parties might reasonably adopt to accomplish it.[2] For due process purposes, the opportunity to guess at the factual and legal bases for government action does not substitute for actual notice of the government's intentions.[3] Specifically, whether a particular method of notice is reasonable, for due process purposes, depends on the particular circumstances and in determining whether a particular method of notice is reasonable for due process purposes, a court must balance the interest of the state and the individual interest sought to be protected by the 14th Amendment.[4]

The Due Process Clause does not require that an effort succeed in giving notice of the pendency of an action.[5] Thus, the failure of notice in a specific case does not establish the inadequacy of the attempted notice for 14th Amendment purposes; instead, the constitutionality of a particular procedure for notice is assessed ex ante rather than post hoc.[6] However, after a manner of service fails, some follow-up measure reasonably calculated to reach the intended recipient suffices as

constitutionally sufficient service in compliance with procedural due-process protections.[7]

The notice which is an elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of an action and afford them an opportunity to present their objections[8] although notice need not be an exhaustive guidebook to preserving one's interest.[9] In other words, it must give sufficient notice of the pendency of the action or proceeding and a reasonable opportunity to a defendant to appear and assert his or her rights before a tribunal legally constituted to adjudicate such rights.[10] Due process must, at a minimum, alert a reasonable recipient to the fact that further inquiry is necessary.[11] The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance;[12] however, if with due regard for the practicalities and peculiarities of a case these conditions are reasonably met, the constitutional requirements are satisfied.[13]

CUMULATIVE SUPPLEMENT

Cases:

For purposes of procedural due process, notice must reasonably convey the required information to the affected party, must afford a reasonable time for that party to respond, and is constitutionally adequate when the practicalities and peculiarities of the case are reasonably met. U.S. Const. Amend. 14. Melton v. Indiana Athletic Trainers Board, 156 N.E.3d 633 (Ind. Ct. App. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Dohany v. Rogers, 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434 (1930); Boone v. Wachovia Bank & Trust Co., 163 F.2d 809, 173 A.L.R. 1285 (App. D.C. 1947); Tennessee Cent. Ry. Co. v. Pharr, 183 Tenn. 658, 194 S.W.2d 486 (1946); In re Marriage of McLean, 132 Wash. 2d 301, 937 P.2d 602 (1997); In re Bergman's Survivorship, 60 Wyo. 355, 151 P.2d 360 (1944).
The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked. Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 Fed. R. Serv. 2d 831 (1962); Miller v. City of Sammamish, 9 Wash. App. 2d 861, 447 P.3d 593 (Div. 1 2019), review denied, 194 Wash. 2d 1024, 456 P.3d 403 (2020).

2 Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); Kornblum v. St. Louis County, Mo., 72 F.3d 661 (8th Cir. 1995); Rasooly v. City of Oakley, 29 Cal. App. 5th 348, 239 Cal. Rptr. 3d 918 (1st Dist. 2018), as modified, (Nov. 21, 2018); Grabowski v. Waters, 901 N.E.2d 560 (Ind. Ct. App. 2009); In re Adoption of Zev, 73 Mass. App. Ct. 905, 899 N.E.2d 111 (2009).

3 Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019).

4 Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); Sams v. City of Milwaukee, Wis., 117 F.3d 991 (7th Cir. 1997); Griffin v. Bierman, 403 Md. 186, 941 A.2d 475 (2008).

5 Ho v. Donovan, 569 F.3d 677 (7th Cir. 2009).

6 Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

7 Matter of on George, 825 S.E.2d 19 (N.C. Ct. App. 2019).

8 Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006); Baker v. Latham Sparrowbush Associates,

72 F.3d 246 (2d Cir. 1995); Matter of Jacobs, 44 F.3d 84 (2d Cir. 1994); Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997); Ho v. Donovan, 569 F.3d 677 (7th Cir. 2009); Bliek v. Palmer, 102 F.3d 1472 (8th Cir. 1997); Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019); Reams v. Irvin, 561 F.3d 1258 (11th Cir. 2009); Kochis v. City of Westland, 409 F. Supp. 3d 598 (E.D. Mich. 2019); U.S. Bank N.A. v. Thunder Properties, Inc., 352 F. Supp. 3d 1042 (D. Nev. 2018); In re Marinari, 596 B.R. 809 (Bankr. E.D. Pa. 2019), order aff'd, 610 B.R. 87 (E.D. Pa. 2019); Corrales v. Bradstreet, 153 Cal. App. 4th 33, 62 Cal. Rptr. 3d 440 (3d Dist. 2007); N.C. v. Anderson, 882 So. 2d 990 (Fla. 2004); Hardy v. Phelps, 165 Idaho 137, 443 P.3d 151 (2019); Grabowski v. Waters, 901 N.E.2d 560 (Ind. Ct. App. 2009); Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc., 41 Kan. App. 2d 914, 206 P.3d 63 (2009); Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019); Ithaca Finance, LLC v. Lopez, 95 Mass. App. Ct. 241, 137 N.E.3d 398 (2019); Wilczak v. City of Niagara Falls, 174 A.D.3d 1446, 108 N.Y.S.3d 79 (4th Dep't 2019); Matter of Duvall, 834 S.E.2d 177 (N.C. Ct. App. 2019); Howard v. Ohio State Racing Commission, 2019-Ohio-4013, 2019 WL 4756976 (Ohio Ct. App. 10th Dist. Franklin County 2019); Resendes v. Brown, 966 A.2d 1249 (R.I. 2009).

Pursuant to due process, notice to the party must be reasonably calculated to inform the party of the pending action and of the opportunity to object. Ursich v. Ursich, 10 Wash. App. 2d 263, 448 P.3d 112 (Div. 1 2019), review denied, 194 Wash. 2d 1022, 455 P.3d 124 (2020).

Foreign nationals, with respect to service of process, are assured of either (1) personal service, which typically will require service abroad; or (2) substituted service that provides a notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and to afford them an opportunity to present their objections. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722, 11 Fed. R. Serv. 3d 417 (1988).

[9] Bank of New York Mellon v. Log Cabin Manor Homeowners Association, 362 F. Supp. 3d 930 (D. Nev. 2019).

[10] Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956); Mexia Independent School Dist. v. City of Mexia, 134 Tex. 95, 133 S.W.2d 118, 134 A.L.R. 1277 (1939); In re Bergman's Survivorship, 60 Wyo. 355, 151 P.2d 360 (1944).

[11] Ramirez v. Young, 906 F.3d 530 (7th Cir. 2018).

When in the absence of notice, property owners are likely to lose a property right, the Due Process Clause requires that the state take reasonable steps to provide enough notice for reasonable persons to realize they must investigate possible remedies. M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 (10th Cir. 2018).

[12] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); N.C. v. Anderson, 882 So. 2d 990 (Fla. 2004); Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019); Jackson v. Commissioner of Human Services, 933 N.W.2d 408 (Minn. 2019); Matter of Commitment of S.L.L., 2019 WI 66, 387 Wis. 2d 333, 929 N.W.2d 140 (2019).

[13] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); In re Coates, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961).

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16B Am. Jur. 2d Constitutional Law § 977

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 977. Form and contents of notice, generally; formality; sufficiency to satisfy due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3975

Notice must describe the nature of the proceeding which may affect the person notified.[1] Moreover, to be sufficient, the notice should state where and at what time the party is to proceed.[2]

Despite the foregoing, due process does not guarantee or prescribe any particular form of notice.[3] It is impossible to set up a rigid formula as to the kind of notice that must be given under the Due Process Clause to inform parties of proceedings affecting their legally protected interests; instead, the notice required will vary with the circumstances and conditions.[4] The due process right to fair notice is a general rule of law that demands a substantial element of judgment and that can hardly be implemented mechanically[5] and the determination of whether a certain form of notice violates due process must be made on a case-by-case basis.[6] In addition, the content of the notice required by due process depends on the appropriate accommodation of the competing interests involved.[7] The degree of required specificity for notice to comport with due process increases with the significance of the interests at stake.[8] Although the relative weight of the liberty or property interest is relevant to the form of notice required by due process, one way or another, some form of notice, whether formal or informal, is required before deprivation of a property interest that cannot be characterized as de minimis.[9]

Notice, to comply with due process requirements, must set forth the alleged misconduct with particularity.[10] Elementary notions of fairness enshrined in constitutional jurisprudence regarding the Due Process Clause also dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.[11]

Observation:

Courts routinely find notice insufficient under the Due Process Clause where such notice simply parrots the broad language of applicable regulations.[12]

A method chosen by the parties to receive notice cannot be deemed to offend due process.[13]

Footnotes

1 Vincent v. Eastern Shore Markets, 970 A.2d 160 (Del. 2009); Kiamesha Development Corp. v. Guild Properties, Inc., 4 N.Y.2d 378, 175 N.Y.S.2d 63, 151 N.E.2d 214 (1958).
For notice to be effective, as required to comply with due process, it must inform the affected party of what critical issue will be determined at the hearing. Nnebe v. Daus, 931 F.3d 66 (2d Cir. 2019).
To be meaningful, notice, as required under due process clause, requires previous notice relative to the issues of fact and law which will control the result to be reached by an administrative tribunal. Personal Care Products, Inc. v. Smith, 578 S.W.3d 262 (Tex. App. Austin 2019).

2 Vincent v. Eastern Shore Markets, 970 A.2d 160 (Del. 2009); McRae v. Robbins, 151 Fla. 109, 9 So. 2d 284 (1942); Schafran & Finkel v. M. Lowenstein & Sons, 280 N.Y. 164, 19 N.E.2d 1005 (1939).
Time, generally, see §§ 981, 982.

3 Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal. 2d 75, 87 P.2d 848 (1939); Fhagen v. Miller, 29 N.Y.2d 348, 328 N.Y.S.2d 393, 278 N.E.2d 615 (1972).
Due process requires only that reasonable notice be given. In Interest of Litdell, 232 So. 2d 733 (Miss. 1970); State ex rel. Sautter v. Grey, 117 Ohio St. 3d 465, 2008-Ohio-1444, 884 N.E.2d 1062 (2008).

4 Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956); Baker v. Latham Sparrowbush Associates, 72 F.3d 246 (2d Cir. 1995); School Bd. of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 242 Ed. Law Rep. 962 (Fla. 2009).
Before the state may take property and sell it for unpaid taxes, the Due Process Clause of the 14th Amendment requires the government to provide the property owner with notice and an opportunity for a hearing appropriate to nature of case. Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

5 Farina v. Metropolitan Transportation Authority, 409 F. Supp. 3d 173 (S.D. N.Y. 2019).

6 Puruczky v. Corsi, 2018-Ohio-1335, 110 N.E.3d 73 (Ohio Ct. App. 11th Dist. Geauga County 2018).

7 Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); Purisch v. Tennessee Technological University, 76 F.3d 1414, 1996 FED App. 0069P (6th Cir. 1996).

8 Nicholas v. Bratton, 376 F. Supp. 3d 232 (S.D. N.Y. 2019).

9 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
For procedural due process, a party need only be accorded oral or written notice of the charges against him. Diamond S.J. Enterprise, Inc. v. City of San Jose, 395 F. Supp. 3d 1202 (N.D. Cal. 2019).

10 Nicholas v. Bratton, 376 F. Supp. 3d 232 (S.D. N.Y. 2019).

11 Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 995 N.E.2d 740 (2013).

12 Watkins v. Greene Metropolitan Housing Authority, 397 F. Supp. 3d 1103 (S.D. Ohio 2019).

13 Ebbe v. Concorde Investment Services, LLC, 392 F. Supp. 3d 228 (D. Mass. 2019), aff'd on other grounds, 2020 WL

1429581 (1st Cir. 2020).

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 978. Voluntary, actual, or extra-official notice where statute does not expressly require notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3975

Under some authority, the requirement of notice as a matter of right in accordance with due process of law is satisfied by a statute which either expressly or by necessary implication confers such right.[1] To be constitutional under other authority, however, the statute itself must specifically require notice since, in the absence of such a requirement, it will be deemed to authorize proceedings without notice.[2]

Actual knowledge cannot operate as a substitute for the notice that is required by due process of law.[3] Hence, extra-official or casual notice is not sufficient.[4]

Due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take the necessary steps to preserve that right.[5]

Footnotes

1 Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238 (1931); In re Lutker, 1954 OK CR 115, 274 P.2d 786 (Okla. Crim. App. 1954).

2 School Dist. No. 8 of Sherman County v. State Bd. of Ed., 176 Neb. 722, 127 N.W.2d 458 (1964); Farnow v. Department 1 of Eighth Judicial Dist. Court in and for Clark County, 64 Nev. 109, 178 P.2d 371 (1947).

3 Watkins v. Dodson, 159 Neb. 745, 68 N.W.2d 508 (1955).

[4] Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. of Los Angeles County, 274 Cal. App. 2d 154, 79 Cal. Rptr. 23 (2d Dist. 1969).

[5] In re Medaglia, 52 F.3d 451 (2d Cir. 1995).

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 979. Necessity of actual or actual personal notice to satisfy due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3975

Personal service of written notice within the jurisdiction is the classic form of notice, always adequate in any type of proceeding to satisfy the requirements of due process.[1] If a party receives actual notice that apprises it of the pendency of the action and affords an opportunity to respond, procedural due process is not offended.[2] Although due process does not require actual notice,[3] due process may be offended by the failure to give actual personal notice under the circumstances of a particular case.[4] Due process requires that a chosen method of service be reasonably certain to give actual notice of the pendency of a proceeding to those parties whose liberty or property interests may be adversely affected by the proceeding.[5] If a party employs a procedure reasonably calculated to achieve notice, a successful achievement is not necessary to satisfy due process requirements.[6]

Footnotes

1 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).
Service of process as required by due process, generally, see Am. Jur. 2d, Process § 92.

2 Morton v. County of Erie, 335 F. Supp. 3d 449 (W.D. N.Y. 2018), aff'd, 796 Fed. Appx. 40 (2d Cir. 2019).

3 Bank of New York Mellon v. Log Cabin Manor Homeowners Association, 362 F. Supp. 3d 930 (D. Nev. 2019); Rasooly v. City of Oakley, 29 Cal. App. 5th 348, 239 Cal. Rptr. 3d 918 (1st Dist. 2018), as modified, (Nov. 21, 2018).

4 Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

[5] Dukes v. Munoz, 346 Ga. App. 319, 816 S.E.2d 164 (2018).

[6] Baker v. Latham Sparrowbush Associates, 72 F.3d 246 (2d Cir. 1995).

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XIV. Due Process of Law

C. Notice

2. Form and Contents of Notice

§ 980. Substituted or constructive service of notice to satisfy due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3975

For due process purposes, there must be some form of constructive or substituted service,[1] especially when actual service is impracticable,[2] as where people are missing or unknown.[3]

Where personal service of notice of court proceedings is not feasible constructive notice may satisfy due process.[4] Due Process Clause requires that, for constructive notice of a lawsuit to be sufficient, a party must exercise due diligence in attempting to locate a litigant's whereabouts.[5] The requirement that unknown parties have at least constructive notice is no dispensable formality; rather, it is an essential element of due process without which a court has no jurisdiction to bind the absent parties.[6]

In considering whether substitute service is adequate, courts are cognizant that due process, reduced to its most elemental component, requires notice.[7] The adequacy of substituted service of process, so far as due process is concerned, is dependent on whether or not the form of service provided for and employed is reasonably calculated to give actual notice of the proceedings and an opportunity to be heard; if it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied.[8]

Practice Tip:

Because substituted service of process statutes provide an exception to the general rule that a defendant must be personally served, they must be strictly construed to protect due process guarantees.[9]

Due process imposes a requirement that service by publication be the best means practicable to provide notice to the interested party.[10] Constructive service of process by publication satisfies due process if and only if the names and addresses of the defendants to be served are not reasonably ascertainable.[11] Notice by publication is not sufficient, under due process requirements, with respect to an individual whose name and address are known or easily ascertainable.[12] Because notice by publication is a notoriously unreliable means of actually informing interested parties about pending suits, the constitutional prerequisite, under the due process clause, for allowing such service when the addresses of those parties are unknown is a showing that reasonable diligence has been exercised in attempting to ascertain their whereabouts.[13] Due diligence in attempting to locate an adverse party before resorting to service by publication, as required by due process, requires that a plaintiff follow up on possessed or reasonably available information or resources.[14]

Footnotes

1 International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945).
As to substituted and constructive service, generally, see Am. Jur. 2d, Process §§ 136 to 144.
Personal service of process on property owners to give notice of a foreclosure action is not required to satisfy due process. Griffin v. Bierman, 403 Md. 186, 941 A.2d 475 (2008).

2 Bekins v. Huish, 1 Ariz. App. 258, 401 P.2d 743 (1965).

3 Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).

4 T.H. McElvain Oil & Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp., Inc., 2017-NMSC-004, 388 P.3d 240 (N.M. 2016).

5 Jordache White and American Transport, LLC v. Reimer, 61 N.E.3d 301 (Ind. Ct. App. 2016).

6 Araca Merchandise L.P. v. Does, 182 F. Supp. 3d 1290 (S.D. Fla. 2016).

7 Century Sur. Co. v. Essington Auto Center, LLC, 2016 PA Super 101, 140 A.3d 46 (2016).

8 Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357 (1940); Rasooly v. City of Oakley, 29 Cal. App. 5th 348, 239 Cal. Rptr. 3d 918 (1st Dist. 2018), as modified, (Nov. 21, 2018); Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1st Dist. 1973).
The adequacy of this notice, as applied to substituted service, depends upon whether it is reasonably calculated to give the party actual notice of the pending litigation and an opportunity to be heard. Century Sur. Co. v. Essington Auto Center, LLC, 2016 PA Super 101, 140 A.3d 46 (2016).
To comply with due process, when some evidence indicates whereabouts of absent party, any form of substituted service authorized by trial court must have reasonable chance of giving that party actual notice of proceeding. People In Interest of A.B-A., 2019 COA 125, 451 P.3d 1278 (Colo. App. 2019).

9 Moss v. Estate of Hudson by and through Hudson, 252 So. 3d 785 (Fla. 5th DCA 2018).

10 Ruffino v. Lokosky, 245 Ariz. 165, 425 P.3d 1108 (Ct. App. Div. 1 2018), review denied, (Dec. 13, 2018).

11 T.H. McElvain Oil & Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp., Inc., 2017-NMSC-004, 388 P.3d 240 (N.M. 2016).

12 Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972); Chapin v. Aylward, 204 Kan. 448, 464 P.2d 177 (1970); In re Turkey Creek Conservancy Dist., 2008 OK 8, 177 P.3d 558 (Okla. 2008).
In too many instances, notice by publication is no notice at all. Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).
As general rule, notice by publication is not enough to comply with due process with respect to person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by proceedings in question. M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 (10th Cir. 2018).

[13] Jorree v. PMB Rentals, LLC, 349 Ga. App. 332, 825 S.E.2d 817 (2019).

[14] Owens v. Tergeson, 2015 COA 164, 363 P.3d 826 (Colo. App. 2015).

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 981. Time of notice for purposes of due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953

Under the Due Process Clause, a defendant has an inalienable right to know in advance the nature of the cause of action being asserted against him.[1] Accordingly, the due process right to notice must be granted at a meaningful time and in a meaningful manner;[2] the person to be affected must be fairly and timely apprised of what interests are sought to be reached by the triggered process.[3] Ordinarily, the notice must be given a sufficient length of time before the hearing to afford an opportunity to be present.[4] Due process requires notice to be given at an appropriate stage in the proceedings to give parties meaningful input in the adjudication of their rights.[5] Specifically, to comply with due process requirements, notice must be given sufficiently in advance of scheduled court proceedings so that a reasonable opportunity to prepare will be afforded.[6]

A notice which fails to give an adequate length of time is invalid, notwithstanding, by the local practice, that there will be several days' additional time before the case can be called for trial or default taken or that the court in its discretion will probably set aside a default judgment and permit a defense.[7] The procedural due process right to notice before deprivation of property must be granted at a time when the deprivation can still be prevented; no damage award for wrongful deprivation can undo the fact that the arbitrary taking that is subject to the right of procedural due process has already occurred.[8] Notice before the government takes property is constitutionally adequate under the due process clause when the practicalities and peculiarities of the case are reasonably met.[9]

The very nature of the principle that notice must be given sufficiently in advance of the hearing to afford an opportunity to be present makes it clear that the question whether, from the viewpoint of time, there has been a sufficient compliance with the notice requirement which the due process guarantee imposes is determinable according to the facts and circumstances of particular cases.[10] The timing of the notice required by due process depends on appropriate accommodation of the competing interests involved.[11]

Other than satisfying a reasonableness standard, no precise rule has been or could be developed specifying precisely how much time is required for a proper notice to satisfy the Due Process Clause; however, a 2-hour notice to a landlord involved in a bankruptcy hearing is clearly inadequate.[12] On the other hand, a police officer's due process rights were not violated where the officer has been informed of a suspension and hearing date six days before the hearing where the officer's union has received copies of the notice and where the second notice establishes the date, nature, and location of the hearing and specified charges.[13]

Footnotes

1 Perez v. Lorraine Enterprises, Inc., 769 F.3d 23 (1st Cir. 2014).

2 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); In re DeLeon J., 290 Conn. 371, 963 A.2d 53 (2009); Department of Highway Safety and Motor Vehicles v. Hofer, 5 So. 3d 766 (Fla. 2d DCA 2009); In re Adoption of B.J.M., 42 Kan. App. 2d 77, 209 P.3d 200 (2009); Matter of L.C.P., 2019 OK CIV APP 34, 456 P.3d 1142 (Div. 2 2019); Gul v. Center for Family Medicine, 2009 SD 12, 762 N.W.2d 629, 242 Ed. Law Rep. 374 (S.D. 2009).

3 Matter of L.C.P., 2019 OK CIV APP 34, 456 P.3d 1142 (Div. 2 2019).

4 Fitzgerald v. Cleland, 650 F.2d 360 (1st Cir. 1981); Jacobson-Lyons Stone Co. v. Silverdale Cut Stone Co., 189 Kan. 511, 370 P.2d 68 (1962); Smith v. Smith, 2 N.Y.2d 120, 157 N.Y.S.2d 546, 138 N.E.2d 790 (1956).
Hearing, generally, see §§ 987 to 1017.
The notice must afford a reasonable time for those interested to make their appearances. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019).

5 Eureka County v. Seventh Judicial District Court in and for County of Eureka, 134 Nev. 275, 417 P.3d 1121, 134 Nev. Adv. Op. No. 37 (2018).

6 Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); Geldermann v. Geldermann, 428 P.3d 477 (Alaska 2018); Town of New Hartford v. Connecticut Resources Recovery Authority, 291 Conn. 489, 970 A.2d 570 (2009).
A failure to timely notify a party in an antidumping proceeding of ex parte meetings deprives the party a full opportunity to respond, thus violating procedural due process. Hyundai Electronics Industries Co., Ltd. v. U.S., 28 Ct. Int'l Trade 517, 342 F. Supp. 2d 1141 (2004).

7 Roller v. Holly, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520 (1900).

8 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).
Due process does not impose a rigid requirement as to the precise timing with which notice must be given, rather, constitutionally adequate notice should apprise a plaintiff of its right of redemption and to enable it to take appropriate steps to protect its property interests prior to deprivation. Farina v. Metropolitan Transportation Authority, 409 F. Supp. 3d 173 (S.D. N.Y. 2019).

9 Cordell v. Klingsheim, 2018 COA 80, 434 P.3d 741 (Colo. App. 2018), cert. denied, 2019 WL 423143 (Colo. 2019).

10 Wick v. Chelan Electric Co., 280 U.S. 108, 50 S. Ct. 41, 74 L. Ed. 212 (1929).

11 Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

12 Matter of Timely Secretarial Service, Inc., 987 F.2d 1167, 25 Fed. R. Serv. 3d 903 (5th Cir. 1993).
It was a denial of due process where the trial judge advanced the date of the hearing on the defendant's motion to set aside the verdict or to grant a new trial and gave notice to the defendants only three hours and 10 minutes before the hearing was to be held. Cremeans v. Goad, 158 W. Va. 192, 210 S.E.2d 169 (1974).

13 Wallace v. Tilley, 41 F.3d 296, 30 Fed. R. Serv. 3d 1317 (7th Cir. 1994).

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16B Am. Jur. 2d Constitutional Law § 982

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 982. Time of notice for purposes of due process requirements—Delay or postponement of notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953

Generally, notice after the fact does not satisfy due process.[1] Exceptions to the general rule, holding that due process requires notice and a hearing prior to a government action involving the deprivation of property rights, occur only in extraordinary situations when some valid governmental interest is at stake, justifying postponing the hearing until after the event.[2] For instance, due process is not denied where the postponement of notice and hearing is necessary to protect the public from contaminated food, from bank failure, from misbranded drugs, to aid collection of taxes, or to aid a war effort.[3] Nevertheless, "extraordinary situations" which will justify postponing due process notice and opportunity for a hearing until after the deprivation of property must be truly unusual.[4]

Observation:

Although an important governmental interest may justify postponement of the notice and hearing until after the initial taking of a protected property interest has occurred, due process is not satisfied by the availability of a collateral judicial remedy separate from the seizure procedure itself.[5]

Footnotes

[1] Richard v. Bank of America, N.A., 258 So. 3d 485 (Fla. 4th DCA 2018).

[2] U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).
For purposes of due process, except in extraordinary situations in which some valid governmental interest is at stake that justifies postponing a hearing until after the event, the government must provide a hearing before depriving an individual of a protected interest. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996).

[3] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974) (holding that the Due Process Clause of the 14th Amendment is not violated by the seizure, under Puerto Rican statutes, of a yacht without prior notice to or hearing of the lessor-owner and of the lessees after the vessel was being used by one of the lessees for the unlawful purpose of transporting or facilitating the transportation of, controlled substances, including marijuana).

[4] Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

[5] Kash Enterprises, Inc. v. City of Los Angeles, 19 Cal. 3d 294, 138 Cal. Rptr. 53, 562 P.2d 1302 (1977).

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 983. Persons entitled to notice under due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953, 3974

Forms

Forms relating to class action notice, generally, see Am. Jur. Pleading and Practice Forms, Parties [Westlaw®(r) Search Query]

Parties whose rights are to be affected are entitled under the due process clause to be heard; in order to enjoy that right, they must first be notified.[1] In other words, persons entitled to notice of a proceeding are, generally, those who are to be affected by a judgment or order therein.[2] Judicial action enforcing a judgment against the person or property of one who has not been a party to the proceeding in which the judgment has been rendered and has not been made a party by service of process is not that due process which the Fifth and 14th Amendments require.[3]

Parties who have properly appeared in action are entitled to notice of any impending motions or hearings under due process of law.[4] Even a pro se answer in the form of a signed letter that identifies the parties, the case, and the defendant's current address, constitutes a sufficient appearance to require notice to that party of any subsequent proceedings as a matter of due process.[5]

Footnotes

[1] Nnebe v. Daus, 931 F.3d 66 (2d Cir. 2019).
As to hearing requirements, generally, see §§ 987 to 1017.

[2] State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)); People ex rel. Morriale v. Branham, 291 N.Y. 312, 52 N.E.2d 881 (1943), opinion adhered to on reargument, 292 N.Y. 127, 54 N.E.2d 331 (1944).

[3] Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

[4] Doe v. Northwestern Memorial Hosp., 2014 IL App (1st) 140212, 385 Ill. Dec. 620, 19 N.E.3d 178 (App. Ct. 1st Dist. 2014).

[5] In re R.K.P., 417 S.W.3d 544 (Tex. App. El Paso 2013).

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 984. Persons entitled to notice under due process requirements—Representative actions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953, 3976

In certain cases, notice to one party may, by reason of representation, be notice to another at least so far as the representative relation is concerned.[1] However, the doctrine of virtual representation must be applied cautiously in order to avoid infringing on the principles of due process because it forces the principles of res judicata on nonparties to a judgment.[2]

Service of process upon an attorney of record when a cause is pending creates a reasonable presumption that it will reach the client and will satisfy due process requirements.[3] However, notice to counsel of record must be effected under circumstances from which it can at least be reasonably presumed that notice resulting from such service will be communicated to the litigant.[4] To pass Constitutional requirements of due process, domestic service of process on counsel of an international defendant, which may include service via electronic means, must be supported by a showing of adequate communication between the person to be served and counsel.[5] Similarly, service of process on an agent appointed by statute affords sufficient due process if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice.[6]

A statute which provides that jurisdiction to render judgment against an association which will bind the joint property of the associates may be acquired by service on one or more of its members is consistent with due process; in addition, so far as constitutionality is concerned, there is no distinction between such a statute applied to partnerships and one applied to other unincorporated associations.[7] However, when it comes to actually reaching the individual property of a person, such as a stockholder in a corporation or a person in an association, notice is required.[8] Notice to a corporation of demands by dissenting stockholders in connection with a vote to sell corporate assets complies with the constitutional requirement of due process of law, even though the effect of such a notice also is to bind the majority stockholders.[9]

Due process is not satisfied by notice to a person known to be an incompetent who is without the protection of a guardian.[10]

Footnotes

1 Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

2 Klugh v. U.S., 818 F.2d 294 (4th Cir. 1987) (holding that heirs not in being or unknown and not represented by guardians ad litem at the time of a condemnation proceeding cannot be bound by condemnation judgments under the doctrine of virtual representation where the adult heirs have not received approval of the condemnation court to represent their interests).
Mandatory class actions aggregating damage claims implicate the due process principle of general application that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715, 43 Fed. R. Serv. 3d 691 (1999).

3 Agrawal v. Oklahoma Dept. of Labor, 2015 OK 67, 364 P.3d 618 (Okla. 2015).

4 Adair Asset Management, LLC/US Bank v. Honey Bear Lodge, Inc., 138 So. 3d 6 (La. Ct. App. 1st Cir. 2014).

5 Halvorssen v. Simpson, 328 F.R.D. 30, 102 Fed. R. Serv. 3d 106 (E.D. N.Y. 2018).

6 Malnar v. Joice, 236 Ariz. 170, 337 P.3d 43, 310 Ed. Law Rep. 1135 (2014).
Plaintiff's service of process on a chief operating officer using the court's e-filing system was reasonably calculated to apprise the officer of the pendency of the securities fraud action, and therefore comported with due process requirements, where the statutory methods of service were impracticable, and the officer's counsel received notices of filings through the system. Wimbledon Financing Master Fund, Ltd. v. Laslop, 169 A.D.3d 550, 95 N.Y.S.3d 152 (1st Dep't 2019).

7 Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291 (1931).

8 Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 (1915); Detroit Trust Co. v. Stormfeltz-Loveley Co., 257 Mich. 655, 242 N.W. 227, 88 A.L.R. 1263 (1932).

9 Voeller v. Neilston Warehouse Co., 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322 (1941).

10 Blackhawk Townhouses Owners Association Inc. v. J.S., 2018 UT App 56, 420 P.3d 128 (Utah Ct. App. 2018).

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 985. When notice is not required under due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953

The government interest in not providing notice is rarely significant, for the purposes of due process analysis, because notice requirements impose little fiscal or administrative burden upon government agencies.[1] Accordingly, the cases in which notice may be dispensed with are few; as a general rule, proceedings not founded on notice to the person affected are void.[2] In certain cases, however, notice is not necessary.[3] In fact, the very nature of particular proceedings may be such as to charge persons to be affected thereby with notice.[4] For instance, the Due Process Clause does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations contained in a state's self-executing statute of limitations.[5] There may also be cases where persons to be affected by proceedings will not be entitled to notice and a hearing under the Due Process Clause because of a waiver thereof, whether by appearance in the proceedings or otherwise.[6]

When necessary to ensure the public safety, the legislature may under its police power authorize municipal authorities summarily to destroy property without legal process or previous notice to the owner, and without recourse against such authorities for the injuries so occasioned; so far as property is dangerous to the safety or health of the community, due process of law may authorize its summary destruction.[7]

A party's ability to take steps to safeguard its interests does not relieve the state of its obligation under Due Process Clause to provide notice of possible adverse action against the party's protected rights.[8] However, due process does not require notice to persons who arrange their affairs to conceal their interests and does not require notice to beneficial, as opposed to legal, owners of real property.[9]

Due process does not require notice of a law.[10] No notice need precede any legislative action of general applicability in order for the action to survive a procedural due process challenge.[11] Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.[12] When a

published law provides a certain amount of time for a person to take action in order to protect his or her property rights, the government generally does not have to notify that person about a deadline, but when it is only after government actions take place that a time period begins to run, due process requires that the government provide notice.[13]

Footnotes

1 Paula E. v. State, Department of Health & Social Services, Office of Children's Services, 276 P.3d 422 (Alaska 2012).

2 Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc., 41 Kan. App. 2d 914, 206 P.3d 63 (2009).

3 Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 Fed. R. Serv. 2d 831 (1962) (finding that not every order entered without notice offends due process).
A statute which permits the seller of goods under an installment contract for the sale of household goods to obtain a writ of sequestration to recover the possession of the goods without prior notice to the buyer or opportunity for a hearing does not violate due process. Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 (1974).

4 Corn Exchange Bank v. Coler, 280 U.S. 218, 50 S. Ct. 94, 74 L. Ed. 378 (1930).
In certain cases of attachment of property in which a redelivery bond is given, the statutes provide for judgment against the principal and sureties on the bond in the event judgment goes in favor of the plaintiff; such a proceeding without notice to the surety has been sustained. Shaumyan v. O'Neill, 987 F.2d 122 (2d Cir. 1993).

5 Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

6 § 986.

7 McCormick v. Stalder, 105 F.3d 1059 (5th Cir. 1997) (holding that procedural due process protections are defined in accordance with the magnitude of the public interest at stake; if the public safety is at issue, liberty or property interests can be deprived even without a prior hearing).

8 M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 (10th Cir. 2018).

9 McKenzie v. City of Chicago, 118 F.3d 552 (7th Cir. 1997).

10 Edmondson v. Fremgen, 17 F. Supp. 3d 833 (E.D. Wis. 2014), aff'd, 590 Fed. Appx. 613 (7th Cir. 2014).

11 37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614, 1997 FED App. 0158P (6th Cir. 1997).
Under the Due Process Clause, governing bodies may enact generally applicable laws, that is, they may legislate, without affording an affected party so much as a notice. Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995), as amended, (July 10, 1995).

12 Othi v. Holder, 734 F.3d 259 (4th Cir. 2013); Edmondson v. Fremgen, 17 F. Supp. 3d 833 (E.D. Wis. 2014), aff'd, 590 Fed. Appx. 613 (7th Cir. 2014).

13 M.A.K. Investment Group, LLC v. City of Glendale, 897 F.3d 1303 (10th Cir. 2018).

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XIV. Due Process of Law

C. Notice

3. Time; Persons Entitled; When Notice Not Required

§ 986. When notice is not required under due process requirements—Waiver by appearance or other act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3881, 3953

The due process right to notice prior to a civil judgment is subject to waiver.[1] Such waiver may arise by reason of a person's voluntary appearance in the proceedings,[2] whether general[3] or special.[4] Thus, if a person actually appears in the proceeding, the notice becomes unimportant.[5]

Consent by contract is an example of a valid written waiver of notice, and a person may agree by contract to be bound by extraterritorial service of process, even in a personal action.[6] In addition, the Supreme Court has found that a cognovit clause in a note is not per se violative of 14th Amendment, and that a valid cognovit clause is an effective waiver of the due process rights to notice and hearing; however, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue and in any event, due process rights to prejudgment notice must be voluntarily, intelligently, and knowingly waived, with awareness of the legal consequences.[7]

Footnotes

1 D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).

2 Louisville & N.R. Co. v. Schmidt, 177 U.S. 230, 20 S. Ct. 620, 44 L. Ed. 747 (1900).

3 State ex rel. Berland Shoe Stores v. Haney, 208 Minn. 105, 292 N.W. 748 (1940).

[4] Western Life Indemnity Co. of Illinois v. Rupp, 235 U.S. 261, 35 S. Ct. 37, 59 LED 220 (1914); Schraner v. Schraner (Emerson), 110 So. 2d 33 (Fla. 1st DCA 1959).
As to general or special appearance, generally, see Am. Jur. 2d, Appearance §§ 2, 3.

[5] Doty v. Love, 295 U.S. 64, 55 S. Ct. 558, 79 L. Ed. 1303, 96 A.L.R. 1438 (1935) (opening of closed bank).

[6] Frey & Horgan Corp. v. Superior Court in and for City and County of San Francisco, 5 Cal. 2d 401, 55 P.2d 203 (1936).

[7] D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972) (finding further that the inability of a debtor who had executed a note containing a cognovit clause authorizing the creditor, upon the debtor's default, to designate any attorney to waive the issuance and service of process and to confess judgment against the debtor in any state court of record, to predict with accuracy how or when the creditor would proceed under the confession clause upon the debtor's default does not in itself militate against an effective waiver of the debtor's due process rights to notice and hearing prior to entry of a judgment against him).
A state's statutes and rules whereby a confession of judgment, pursuant to a contractual cognovit provision, may be entered without notice or hearing by a prothonotary upon application by the plaintiff who, although required to mail notice to the defendant within 20 days after entry of judgment, may issue a writ of execution before the notice is mailed, and whereby the defendant, to obtain relief by striking or opening the judgment, must assert prima facie grounds for relief and must persuade the court to open the judgment, are not unconstitutional on their face as violative of due process; under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. Swarb v. Lennox, 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138 (1972).

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XIV. Due Process of Law

D. Hearing

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Research References

West's Key Number Digest

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A.L.R. Library

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XIV. Due Process of Law

D. Hearing

1. In General

§ 987. Necessity of hearing under due process requirements, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3881, 4061

The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.[1] An opportunity for a hearing before a competent and impartial tribunal upon proper notice is one of the essential elements of due process.[2] The opportunity to be heard has been referred to as a fundamental requirement,[3] or an issue of fundamental fairness,[4] or a fundamental premise,[5] or a fundamental requisite,[6] or a fundamental pillar of due process.[7] The constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard.[8] Due process requires that a person have a fair chance to respond to allegations made against him, and that opportunity must be provided in a reliable and orderly fashion.[9] However, the hearing required by the Due Process Clause is only one appropriate to the nature of the case.[10]

Just as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in proceedings without a hearing or opportunity to be heard, so it cannot, without disregarding the requirement of due process, give conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.[11] It is a violation of due process for a judgment to be made binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard.[12]

Footnotes

[1] Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996); Rogal v. American Broadcasting Companies, Inc., 74 F.3d 40, 34 Fed. R. Serv. 3d 388 (3d Cir. 1996); Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).
Although the concept is flexible, the right to procedural due process encompasses the opportunity to be heard when the

state seeks to infringe a protected liberty or property right. Hise v. Laiviera, 2018-Ohio-5399, 127 N.E.3d 460 (Ohio Ct. App. 7th Dist. Monroe County 2018).
Due process requires that a party be given a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him. VMD Financial Services, Inc. v. CB Loan Purchase Associates, LLC, 68 So. 3d 997 (Fla. 4th DCA 2011).
The crux of due process is an opportunity to be heard and the right to adequately represent one's interests. Markham v. Kodiak Island Borough Board of Equalization, 441 P.3d 943 (Alaska 2019).
A "request for a hearing" is a request for an opportunity to be heard, which necessarily implicates due process. Muma v. Pennsylvania Department of Health, Division of Nursing Care Facilities, 223 A.3d 742 (Pa. Commw. Ct. 2019).

[2] U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985); Anthony v. Interform Corp., 96 F.3d 692 (3d Cir. 1996); Mallette v. Arlington County Employees' Supplemental Retirement System II, 91 F.3d 630 (4th Cir. 1996).
In all cases of a due process claim, the inquiry is whether, under the particular circumstances presented, the hearing was fair and accorded the individual the essential elements of due process. Patrick v. Success Academy Charter Schools, Inc., 354 F. Supp. 3d 185, 362 Ed. Law Rep. 928 (E.D. N.Y. 2018).

[3] Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996); Elrod v. Bauman, 136 N.E.3d 232 (Ind. Ct. App. 2019).
Due process requires a meaningful opportunity to be heard, to testify, and to present evidence; otherwise, it is fundamental error. Serna v. State, 264 So. 3d 999 (Fla. 4th DCA 2019).

[4] Campbell v. Barr, 387 F. Supp. 3d 286 (W.D. N.Y. 2019).

[5] Morera v. Thurber, 187 Conn. App. 795, 204 A.3d 1 (2019).

[6] Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).

[7] Doe v. Department of Health and Human Services, 2018 ME 164, 198 A.3d 782 (Me. 2018).

[8] Aden v. Nielsen, 409 F. Supp. 3d 998 (W.D. Wash. 2019); L.M.F. v. C.D.F., 2019 WL 3243989 (Ala. Civ. App. 2019); Department of Revenue ex rel. Poynter v. Bunnell, 51 So. 3d 543 (Fla. 1st DCA 2010).
When a protected interest is implicated, the Fourteenth Amendment Due Process Clause grants an aggrieved party the opportunity to present his case and have its merits fairly judged. Doe I v. Evanchick, 355 F. Supp. 3d 197 (E.D. Pa. 2019).

[9] Life Technologies Corporation v. Govindaraj, 931 F.3d 259 (4th Cir. 2019), as amended, (Aug. 7, 2019).

[10] Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

[11] Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).

[12] Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552, 26 Fed. R. Serv. 2d 669 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 988. Purpose of hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his or her possessions; the purpose of such a requirement is not only to ensure abstract fair play to the individual, but also more particularly to protect his or her use and possession of property from arbitrary encroachment, minimizing substantively unfair or mistaken deprivations of property.[1] Since the essential reason for the due process requirement of a hearing prior to deprivation of property is to prevent unfair and mistaken deprivations of property, such a hearing must provide a real due process test.[2]

The right of access to the courts is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.[3]

Footnotes

1 Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); Shavers v. Kelley, 402 Mich. 554, 267 N.W.2d 72 (1978).

2 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972); Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461, 924 N.W.2d 594 (Minn. 2019).

3 Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 989. Minimum due process requirements regarding hearing, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879 to 3881, 3893

An opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement.[1] The requirements of procedural due process are not satisfied simply because a hearing took place, and the court looks to the substance, not to bare form, to determine whether constitutional minimums have been honored.[2]

The right to a hearing does not depend upon the nature of the right violated, that is, whether the right is a fundamental right or is state-created.[3]

Observation:

The right to a hearing under the Due Process Clause does not depend on a demonstration of certain success.[4] Litigation is rarely pristine and is filled with risk, as evidence gets lost, witnesses lie, judges err, and the Due Process Clause does not protect against these missteps as such; rather, its interest is only in whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result.[5]

The constitutionally protected rights afforded by due process include the right to be heard which, in certain circumstances, includes the right to assistance from an interpreter during the proceedings itself.[6]

The Fifth Amendment entitles aliens to due process of law in deportation proceedings, and detention during such proceedings is constitutionally valid aspect of deportation process.[7]

Due process is not denied when a party fails to avail himself of the opportunity to be heard after it is offered to him.[8]

Footnotes

1 Saavedra v. City of Albuquerque, 73 F.3d 1525 (10th Cir. 1996); Hargis v. Hargis, 2019 Ark. 321, 587 S.W.3d 208 (2019); Williams v. Board of Supervisors, Louisiana Community & Technical College Systems, 272 So. 3d 84, 367 Ed. Law Rep. 656 (La. Ct. App. 3d Cir. 2019).
Character and sufficiency of hearing, generally, see §§ 997 to 1001.

2 Johnson v. Morales, 946 F.3d 911 (6th Cir. 2020).

3 Howard v. Grinage, 82 F.3d 1343, 1996 FED App. 0130P (6th Cir. 1996).

4 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 23 Ed. Law Rep. 473 (1985).

5 Energy West Mining Co v. Oliver, 555 F.3d 1211 (10th Cir. 2009).

6 City of Philadelphia v. Shih Tai Pien, 224 A.3d 71 (Pa. Commw. Ct. 2019).

7 Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003).

8 Zale v. Moraine Valley Community College, 2019 IL App (1st) 190197, 434 Ill. Dec. 253, 135 N.E.3d 137, 372 Ed. Law Rep. 411 (App. Ct. 1st Dist. 2019), appeal denied, 435 Ill. Dec. 707, 140 N.E.3d 265 (Ill. 2020).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 990. Minimum due process requirements regarding hearing, generally—Requirement of meaningful opportunity to be heard

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3881

A failure to accord an accused a fair hearing violates even minimal standards of due process.[1] The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.[2] Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.[3]

Footnotes

1 Turner v. State of La., 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

2 Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Johnson v. Morales, 946 F.3d 911 (6th Cir. 2020); Clancy v. Office of Foreign Assets Control of U.S. Dept. of Treasury, 559 F.3d 595 (7th Cir. 2009); Dahl v. Rice County, Minn., 621 F.3d 740 (8th Cir. 2010); Ford v. Saul, 950 F.3d 1141 (9th Cir. 2020); Gordon v. Arizona Registrar of Contractors, 247 Ariz. 146, 447 P.3d 327 (Ct. App. Div. 1 2019); Hargis v. Hargis, 2019 Ark. 321, 587 S.W.3d 208 (2019); Bailey v. Review Board of Indiana Department of Workforce Development, 132 N.E.3d 386 (Ind. Ct. App. 2019); Matter of Duvall, 834 S.E.2d 177 (N.C. Ct. App. 2019); In re C.L.S., 2020 VT 1, 2020 WL 111665 (Vt. 2020).
Time of hearing, generally, see § 1001.
Procedural due process safeguards a person's constitutional rights and requires that a person be given a meaningful opportunity to be heard. Patterson v. Charles, 282 So. 3d 1075 (La. Ct. App. 4th Cir. 2019).
Within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to

fulfill the promise of the Due Process Clause. Shah v. Shah, 70 Va. App. 588, 829 S.E.2d 586 (2019).

The essential principle embodied in the Due Process Clause is this: the government may not deprive a person of a property right or a liberty interest without affording that person the opportunity to be heard in a meaningful way and at a meaningful time to avert a wrongful deprivation of that right or interest. State v. Gonzalez, 457 P.3d 938 (Kan. Ct. App. 2019).

The opportunity for hearing required to satisfy due process must be appropriate to the nature of the case, and must be at a meaningful time and in a meaningful manner. Lemus v. Martinez, 2019 WY 52, 441 P.3d 831 (Wyo. 2019).

[3] In Interest of D.W., 498 S.W.3d 100 (Tex. App. Houston 1st Dist. 2016); State v. Lagrone, 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636 (2016).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 991. Form of hearing required to satisfy due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3875, 3879

The Due Process Clause generally requires some form of hearing in making a disposition of property interests.[1] However, the Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of a private interest.[2] Thus, the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law or indeed even substantial ones are raised.[3]

No single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.[4] A weighing process is part of any determination of the form of hearing required in particular situations by procedural due process.[5] It is permissible for the hearing's formality and its procedural requisites to vary, depending upon the importance of the interests involved and the nature of any subsequent proceedings.[6]

For purposes of due process, it is not required that whenever a protectable interest is involved there be some form of traditional adversary, judicial, or administrative hearing before or after deprivation of the interest; due process is flexible, calling for such procedural protections as the particular situation demands, and just as there is no requirement as to exactly what procedures to employ whenever a traditional, judicial-type hearing is mandated, there is no reason to require a judicial-type hearing in all circumstances.[7] Therefore, the nature and form of a hearing are legitimately open to many potential variations and are a subject for legislation, not adjudication.[8]

The Due Process Clauses do not confer a right to a predeprivation hearing in every case in which a public officer deprives an individual of liberty or property.[9] While due process ordinarily requires an opportunity for some kind of hearing prior to deprivation of a significant property interest, summary administrative action may be justified in emergency situations.[10] A predeprivation hearing need not approximate a trial-like proceeding; in fact, it may be very limited and still pass constitutional procedural due process muster.[11]

Practice Tip:

The hearing required by procedural due process depends on (1) the nature of the private interest at stake, (2) the risk of erroneous deprivation given procedures already guaranteed, and whether additional procedural safeguards would prove valuable, and (3) the government's interest and the burdens that additional procedures might impose.[12]

The due process right to trial by jury is not violated by a state's "two-tier" trial system for specified crimes, under which an accused is tried in the lower tier, in which no trial by jury is available, and, if convicted, may make a timely appeal to the second tier in which he or she is entitled to a trial de novo by a jury.[13]

Footnotes

1 Rein v. Socialist People's Libyan Arab Jamahiriya, 568 F.3d 345, 79 Fed. R. Evid. Serv. 1139 (2d Cir. 2009).

2 Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

3 Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).

4 Bridge Aina Le'a, LLC v. Land Use Commission, 950 F.3d 610 (9th Cir. 2020).

5 Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

6 Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); Purisch v. Tennessee Technological University, 76 F.3d 1414, 1996 FED App. 0069P (6th Cir. 1996).
What process must be afforded, pursuant to the due process clause, is determined by the context, dependent upon the nature of the matter or interest involved. City of Little Rock v. Alexander Apartments, LLC, 2020 Ark. 12, 592 S.W.3d 224 (2020).

7 Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).
Proceedings in which a hearing is not required, see § 995.
Due process is a flexible concept, requiring only such procedural protections as the particular situation demands. Lunon v. Botsford, 946 F.3d 425 (8th Cir. 2019); Simms v. Maryland Department of Health, 467 Md. 238, 223 A.3d 1012 (2020); State v. Sevastopoulos, 2020 UT App 6, 458 P.3d 1149 (Utah Ct. App. 2020).
Constitutional due process is an especially elastic concept in that the protections required vary depending upon the importance of the specific property right or liberty interest at stake. State v. Gonzalez, 457 P.3d 938 (Kan. Ct. App. 2019).

8 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

9 Holly v. Woolfolk, 415 F.3d 678 (7th Cir. 2005).

10 Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

11 Diamond S.J. Enterprise, Inc. v. City of San Jose, 395 F. Supp. 3d 1202 (N.D. Cal. 2019).

12 Diamond S.J. Enterprise, Inc. v. City of San Jose, 395 F. Supp. 3d 1202 (N.D. Cal. 2019) (determination whether a predeprivation hearing is required); K.M.H.C. v. Barr, 2020 WL 614035 (S.D. Cal. 2020); Tapia v. City of

Albuquerque, 10 F. Supp. 3d 1323 (D.N.M. 2014); E.O.H.C. v. Barr, 2020 WL 362725 (E.D. Pa. 2020); State Construction, Inc. v. City of Sammamish, 457 P.3d 1194 (Wash. Ct. App. Div. 1 2020).

[13] Ludwig v. Massachusetts, 427 U.S. 618, 96 S. Ct. 2781, 49 L. Ed. 2d 732 (1976).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 992. Hearings on property rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3893, 4061

Some form of hearing is required before an individual is finally deprived of a property interest by the government.[1] The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions.[2] The fundamental requirement of procedural due process is that a person to be deprived of a property interest be given an opportunity to be heard at a meaningful time and in a meaningful manner.[3] The government must provide a litigant with a fair opportunity, under the Due Process Clause, to mount a meaningful defense to the proposed deprivation of its property.[4] In disposing of property interests, due process requires that each affected individual has had a fundamentally fair chance to present his or her side of the story and to rebut opposing submissions.[5] In the ordinary case, a citizen has a right to a hearing to contest the forfeiture of his or her property, a right secured by the Due Process Clause and implemented by a federal rule.[6]

Procedural due process safeguards should accompany a situation where the administrative action is adjudicatory in nature and involves substantial property rights.[7] Accordingly, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing required under due process.[8] Any significant taking of property by the state is within the purview of the Due Process Clause, and while the length and consequent severity of a deprivation may be factors to weigh in determining the appropriate form of hearing, they are not decisive of the basic right to a prior hearing of some kind.[9]

The due process right to be heard prior to any deprivation of property does not depend upon an advance showing that one will surely prevail at the hearing; the simplicity of the issues involved in determining the ultimate right to continued possession of the property may be relevant to the formality and scheduling of the prior hearing, but it cannot undercut the right to a prior hearing of some kind.[10] The test for due process in the sense of procedural minima requires a comparison of costs and benefits of whatever procedure the plaintiff contends is required.[11] However, the ordinary costs in time, effort, and expense imposed by a hearing cannot outweigh the constitutional right to a hearing prior to deprivation of property.[12] The fact that an additional

expense will be occasioned by an expanded hearing does not justify denying a hearing which meets the standards of procedural due process[13] since due process cannot be measured in minutes and hours or in dollars and cents.[14]

Footnotes

1 Lawrence v. Reed, 406 F.3d 1224 (10th Cir. 2005); Supreme Home Health Services, Inc. v. Azar, 380 F. Supp. 3d 533 (W.D. La. 2019).

2 McDonald v. Keahey, 2019 WL 3980631 (Ala. Civ. App. 2019).

3 Sharp v. Becerra, 393 F. Supp. 3d 991 (E.D. Cal. 2019).
It is a fundamental tenet of due process that persons whose property rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. Dicker v. Dicker, 189 Conn. App. 247, 207 A.3d 525 (2019).

4 Energy West Mining Co v. Oliver, 555 F.3d 1211 (10th Cir. 2009) (also stating that in some cases, it will be unnecessary for a party to show any specific prejudice in order to establish that it was prevented from mounting a meaningful defense).

5 Rein v. Socialist People's Libyan Arab Jamahiriya, 568 F.3d 345, 79 Fed. R. Evid. Serv. 1139 (2d Cir. 2009).

6 Degen v. U.S., 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996), referring to Supplemental Rules for Certain Admiralty and Maritime Claims Rule C(6).

7 McCloskey v. Pennsylvania Public Utility Commission, 195 A.3d 1055 (Pa. Commw. Ct. 2018), appeal denied, 207 A.3d 290 (Pa. 2019).

8 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

9 Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

10 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

11 Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997).

12 Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

13 Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

14 Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 993. Particular situations requiring hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 4061

The requirement of a hearing in accordance with due process of law applies in a wide variety of proceedings, persons, and subjects, including but not limited to—

— the risks of error inherent in a decision to have a child institutionalized for mental health care.[1]

— the taking of private property, the revocation of licenses, the operation of state dispute settlement mechanisms, or the right to government-created jobs held absent any "cause" for termination.[2]

— confinement that rests on the theory of civil contempt.[3]

— termination of parental rights to children.[4]

— depriving a citizen of his or her driver's license and vehicle registration.[5]

— termination of public assistance payments.[6]

— deprivation of one's wages through garnishment.[7]

— expulsion of a student from a state university or college.[8]

A city's placement of barricades restricting access to a store from a public street violated the store owners' procedural due process rights, even though the owners were given notice of the barricades, where the city did not provide the owners with a hearing either before or after the placement of the barricades, and there was no showing that it would have been impossible for the city to grant a postdeprivation hearing.[9] The destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality also violates due process.[10] A driving license may not be suspended or terminated without first affording the licensee a meaningful hearing on the issue as required by the procedural due process guarantees of the federal and state constitutions.[11]

However, a traveler to Iraq was afforded appropriate due process, in connection with the imposition of a civil fine for violating restrictions on contact with the country, even though a requested testimonial hearing was denied as the traveler was given advance notice of an intent to impose the fine, the reasons for the fine were communicated, and the traveler was given

an opportunity to respond; the requested evidentiary hearing was not required; and the traveler was afforded court review of the final administrative decision.[12] Similarly, the procedure of the city's confirmation hearing regarding a local improvement district (LID) assessment did not violate the due process owed to a taxpayer challenging the assessment, where the city, at the conclusion of its initial meeting on accepting the assessment roll, explicitly encouraged the taxpayer to talk to an appraiser and get a second opinion as to whether the LID improvements benefited its property, and the taxpayer was able to question a city appraiser at a later hearing.[13] Finally, property owners seeking to challenge a city's special assessment to fund a city's fire protection services were not denied procedural due process; the property owners were provided notice, and in addition to the validation hearing, the city publicly discussed the special assessment at four public hearings, and at the validation hearing, the trial court extended the time for property owners to voice their concerns.[14]

Footnotes

1 Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979); Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

2 Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Spinelli v. City of New York, 579 F.3d 160 (2d Cir. 2009) (a gun shop owner's due process rights were violated when the city suspended her gun dealer's license for about two months and confiscated her firearms inventory, without a postdeprivation hearing or other process); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

3 Pounders v. Watson, 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997); McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed. 2d 719 (1972).

4 Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

5 Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

6 Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

7 Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).

8 Dixon v. Alabama State Bd. of Ed., 294 F.2d 150 (5th Cir. 1961).

9 Warren v. City of Athens, Ohio, 411 F.3d 697, 2005 FED App. 0261P (6th Cir. 2005).

10 State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

11 Miles v. Shaw, 272 Ga. 475, 532 S.E.2d 373 (2000).

12 Karpova v. Snow, 402 F. Supp. 2d 459 (S.D. N.Y. 2005), aff'd, 497 F.3d 262 (2d Cir. 2007).

13 Hamilton Corner I, LLC v. City of Napavine, 200 Wash. App. 258, 402 P.3d 368 (Div. 2 2017), as amended, (Sept. 12, 2017).

14 Morris v. City of Cape Coral, 163 So. 3d 1174 (Fla. 2015).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 994. Conditions and restrictions on hearings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

Since an individual's due process right to an opportunity to be heard does not ensure a hearing in all contexts,[1] reasonable conditions may be imposed on the right to a hearing or to access to the courts, generally,[2] such as by requiring security.[3] A plaintiff who asserts the right to hearing under the Due Process Clause must show that facts he or she seeks to establish in that hearing are relevant under the applicable statutory scheme.[4]

Durational residency requirements may be imposed as a condition precedent to bringing certain types of actions, such as those for divorce.[5] Similarly, due process of law does not compel a state to open its courts to suits by foreign corporations on transitory causes of action occurring elsewhere.[6]

On the other hand, the requirements of due process are not met where the right to a hearing is granted only on conditions so harsh and oppressive as to be tantamount to a denial of the right.[7] Generally, state restraints upon access to the courts will be invalidated when they are so arbitrary, unequal, and oppressive as to shock the sense of fairness the 14th Amendment was intended to satisfy.[8]

A state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they are unable to pay.[9] The rule that the Due Process Clause of the 14th Amendment prohibits a state from denying indigent divorce plaintiffs access to its courts, solely on the basis of an inability to pay court fees and costs, includes the costs of service of summons by publication which are to be paid by the local governing unit.[10] Nonetheless, a requirement that an indigent pay filing fees for voluntary bankruptcy is not unconstitutional.[11]

The application of Rules on Lawyer Disciplinary Enforcement, requiring that evidence developed in disciplinary proceedings and investigations prior to the filing of a formal complaint be kept confidential, did not deprive attorneys of their due process

rights, based on the alleged effect of precomplaint confidentiality on their ability to prepare for cases before the Commission on Practice, where the attorneys were given detailed formal complaints, allowed to discover adverse witnesses and proposed hearing exhibits; where neither attorney claimed surprise at the evidence presented; and where any evidence that came to light during the informal investigation but did not relate to matters included in the formal complaint and did not enter into ultimate outcome.[12]

Footnotes

1 Elliott v. Kiesewetter, 98 F.3d 47, 35 Fed. R. Serv. 3d 742 (3d Cir. 1996).

2 Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921); Gulf, C. & S. F. Ry. Co. v. State of Texas, 246 U.S. 58, 38 S. Ct. 236, 62 L. Ed. 574 (1918).

3 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837, 17 A.L.R. 873 (1921).

4 Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

5 Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532, 19 Fed. R. Serv. 2d 925 (1975); Davis v. Davis, 297 Minn. 187, 210 N.W.2d 221 (1973).

6 Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio L. Abs. 146 (1952).

7 St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919); Wadley Southern Ry. Co. v. State of Georgia, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1915).

8 Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, 43 S. Ct. 55, 67 L. Ed. 115 (1922).

9 Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

10 Deason v. Deason, 32 N.Y.2d 93, 343 N.Y.S.2d 321, 296 N.E.2d 229 (1973).

11 U.S. v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).

12 Goldstein v. Commission on Practice of Supreme Court, 2000 MT 8, 297 Mont. 493, 995 P.2d 923 (2000).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 995. Proceedings in which hearing is not required

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3881, 4027

Due process of law does not require a hearing in every conceivable case of government impairment of a private interest.[1] The due process right to a prior hearing attaches only to the deprivation of an interest encompassed within the 14th Amendment's protection.[2] For purposes of the Due Process Clause requirement that a person be given the opportunity to be heard, no process is due if one is not deprived of life, liberty, or property.[3] Furthermore, due process does not require that the defendant in every civil case actually have a hearing on the merits.[4] A federal trial court is not required to hold a hearing to comply with procedural due process, but may do so if the court believes the hearing would assist the court to resolve the case.[5]

Eliminating the due process right to a hearing can be constitutional, where there is an adequate administrative process in place.[6] Additionally, there is no inexorable due process requirement that oral testimony must be heard in every administrative proceeding in which it is tendered.[7] Written submissions may substitute oral presentation for due process purposes as long as the deprived party has the opportunity to be heard at a meaningful time and in a meaningful way.[8] Dismissal of a convict from a position as a head inmate clerk did not deprive the convict of any property right without due process in view of the fact that prison officials were entitled to remove the convict from the position at any time without an investigation or hearing.[9] The Due Process Clause of the 14th Amendment does not require a state to provide for an automatic hearing in every case of removing a foster child from a foster home, even when the foster parents choose not to seek one.[10]

In limited circumstances, immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible where (1) the seizure is directly necessary to secure an important governmental or general public interest; (2) there is a special need for very prompt action; and (3) the state keeps strict control over its monopoly of legitimate force, that is, the person initiating the seizure is a government official responsible for determining, under the standards of a narrowly drawn statute, that a seizure without a prior hearing is necessary and justified in the particular instance.[11] Thus, for instance, due process does not require a prior hearing where an emergency situation exists and an

administrative agency takes some action to protect the public against economic injury.[12] Likewise, if public safety is at issue, liberty or property interests can be deprived even without a prior hearing.[13] For example, social workers could remove seven- and nine-year-old girls from their parents' home without a prior hearing due to exigent circumstances without violating procedural due process requirements when one child displayed bruises consistent with beatings and the second child was found alone in the apartment.[14]

The central demands of procedural due process are an opportunity to be heard at a meaningful time and in a meaningful manner, and such requirements are implicated only by adjudications, not by state actions that are legislative in character.[15] The Due Process Clause does not entitle people to hearings at which they will contest the wisdom of substantive legislative choices.[16] In other words, due process under the Fourteenth Amendment does not require any hearing or participation in legislative decision-making other than that afforded by judicial review after rule promulgation.[17] Many acts of government[18] are validly exercised without a hearing, especially if the matter is subject to revision in the courts, and no opportunity to be heard need precede any legislative action of general applicability in order for the action to survive a procedural due process challenge.[19] Thus, legislation which meets the test of a proper exercise of the police power will not be struck down on the ground that because of deficiencies respecting notice and hearing, it does not comport with the requirements of due process.[20]

Footnotes

1 Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988); Cleland v. National College of Business, 435 U.S. 213, 98 S. Ct. 1024, 55 L. Ed. 2d 225 (1978); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

2 Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

3 Cancino Castellar v. McAleenan, 388 F. Supp. 3d 1218 (S.D. Cal. 2019).

4 Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); United States v. Batato, 833 F.3d 413 (4th Cir. 2016); Prime Rate Premium Finance Corporation, Inc. v. Larson, 930 F.3d 759, 104 Fed. R. Serv. 3d 365 (6th Cir. 2019).

5 Allen v. United States, 145 Fed. Cl. 390 (2019).

6 Martinez v. McAleenan, 385 F. Supp. 3d 349 (S.D. N.Y. 2019), appeal withdrawn, 2019 WL 7944831 (2d Cir. 2019).

7 Biliski v. Red Clay Consol. School Dist. Bd. of Educ., 574 F.3d 214, 247 Ed. Law Rep. 624 (3d Cir. 2009).

8 Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).

9 Duval v. Smith, 50 A.D.2d 1066, 375 N.Y.S.2d 711 (4th Dep't 1975).

10 Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

11 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974) (holding that Puerto Rico could, without any notice or hearing, seize a yacht on which marijuana was transported by its lessees without the knowledge of the owner/lessor).

12 Sierra Life Ins. Co. v. Rottman, 95 Nev. 654, 601 P.2d 56 (1979).

13 McCormick v. Stalder, 105 F.3d 1059 (5th Cir. 1997).

14 Park v. City of New York, 2003 WL 133232 (S.D. N.Y. 2003).

15 Sutton v. Bickell, 220 A.3d 1027 (Pa. 2019).

16 Mascow v. Board of Education of Franklin Park School District No. 84, 950 F.3d 993 (7th Cir. 2020).

17 Edelhertz v. City of Middletown, 943 F. Supp. 2d 388 (S.D. N.Y. 2012), aff'd, 714 F.3d 749 (2d Cir. 2013).

18 Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 S. Ct. 575, 78 L. Ed. 1141 (1934) (revocation of a motor vehicle fuel distributors' license).

19 37712, Inc. v. Ohio Dept. of Liquor Control, 113 F.3d 614, 1997 FED App. 0158P (6th Cir. 1997).

20 Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E.2d 712 (1949).

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XIV. Due Process of Law

D. Hearing

1. In General

§ 996. Proceedings in which hearing not required—Waiver or loss of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

The due process right to a hearing prior to a civil judgment is subject to waiver,[1] provided that such a waiver is made voluntarily, intelligently, and knowingly and with awareness of the legal consequences.[2] Moreover, the waiver must be clear and unequivocal.[3]

Such a waiver may arise by contract, as in the case of a debt instrument containing a cognovit provision, authorized under state law, whereby the holder, upon the debtor's default, could designate any attorney to waive the issuance and service of process and to confess judgment against the debtor in any state court of record,[4] or it may arise by a consent decree entered into by the parties to a case after careful negotiation.[5]

Any right to a hearing may also be lost by delay.[6] The fact that opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied.[7] A state can enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication.[8]

Footnotes

[1] D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972); Cliff v. Board of School Com'rs of City of Indianapolis, Ind., 42 F.3d 403, 96 Ed. Law Rep. 365 (7th Cir. 1994).

[2] D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).

[3] National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs, 616 F.2d 420 (9th Cir. 1980).

[4] D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).

[5] U.S. v. Armour & Co., 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971).

[6] O'Neil v. Northern Colorado Irr. Co., 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed. 123 (1916) (holding that there is no denial of due process in a provision that if the person affected takes no steps to assert his or her rights within four years after the judicial assertion of an adverse title, he or she will lose those rights).

[7] American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932).

[8] Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); McLaughlin v. State, Bureau of Motor Vehicles, 43 Ohio Misc. 29, 72 Ohio Op. 2d 295, 334 N.E.2d 8 (C.P. 1975).

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 997. Conduct of hearing under due process requirements, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879 to 3881

The proceeding or hearing requisite to due process must be appropriate,[1] fair,[2] adequate,[3] and such as is practicable and reasonable in the particular case.[4]

A fair trial in fair tribunal is a basic requirement of due process.[5]

Observation:

The trial of the case is unquestionably one of the meaningful occasions at which the parties must be given an opportunity to be heard to satisfy procedural due process.[6]

All that is necessary to comply with due process is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard to ensure that they are given a meaningful opportunity to present their case.[7] Although due process requires some form of hearing prior to a final deprivation of a protected property interest, the exact nature and mechanism of the required procedure will vary; the unique circumstances surrounding the controversy determine the minimal requirements.[8] The specific requirements of procedural due process depend on the facts of each case, and could encompass any number of the following components: (1) notice of the basis for the government action; (2) a

neutral decision maker; (3) the opportunity to orally present a case against the state; (4) the opportunity to present evidence and witnesses against the state; (5) the opportunity to cross-examine witnesses; (6) the right to have an attorney present at the hearing; and (7) a decision based on the evidence presented at the hearing accompanied by an explanation of the decision.[9]

Due process does not mean litigants are entitled to unlimited amount of the court's time.[10]

Footnotes

1 Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); Beaudreau v. Superior Court, 14 Cal. 3d 448, 121 Cal. Rptr. 585, 535 P.2d 713 (1975).

2 Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); Juster Bros. v. Christgau, 214 Minn. 108, 7 N.W.2d 501 (1943); Merritt v. Swope, 267 A.D. 519, 46 N.Y.S.2d 944 (1st Dep't 1944).
In the civil context, structural error, which requires per se reversal, typically occurs when the trial court violates a party's right to due process by denying the party a fair hearing. Severson & Werson, P.C. v. Sepehry-Fard, 37 Cal. App. 5th 938, 249 Cal. Rptr. 3d 839 (6th Dist. 2019).

3 Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734, 6 Fed. R. Serv. 2d 831 (1962); State v. Industrial Tool & Die Works, 220 Minn. 591, 21 N.W.2d 31 (1945); Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

4 Geo S Bush & Co v. U S, 22 Cust. Ct. 158, 135 F. Supp. 696 (Cust. Ct. 1 Div. 1949).

5 Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (stating that due process may sometimes bar a trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties); Echavarria v. Filson, 896 F.3d 1118 (9th Cir. 2018), cert. denied, 139 S. Ct. 2613, 204 L. Ed. 2d 276 (2019); Saucon Valley Manor, Inc. v. Miller, 392 F. Supp. 3d 554 (E.D. Pa. 2019); People v. Roehrs, 2019 COA 31, 440 P.3d 1231 (Colo. App. 2019); People v. Towns, 33 N.Y.3d 326, 102 N.Y.S.3d 151, 125 N.E.3d 816 (2019); Citibank, N.A. v. Hine, 2019-Ohio-464, 130 N.E.3d 924 (Ohio Ct. App. 4th Dist. Ross County 2019), appeal not allowed, 156 Ohio St. 3d 1406, 2019-Ohio-2261, 123 N.E.3d 1038 (2019); State v. Decosimo, 555 S.W.3d 494 (Tenn. 2018), cert. denied, 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019); Matter of Dependency of A.E.T.H., 9 Wash. App. 2d 502, 446 P.3d 667 (Div. 1 2019).

6 Howell v. Jurgens, 264 So. 3d 1233 (La. Ct. App. 2d Cir. 2019).

7 Aden v. Nielsen, 409 F. Supp. 3d 998 (W.D. Wash. 2019); JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College Dist., 30 Cal. App. 5th 945, 242 Cal. Rptr. 3d 197 (2d Dist. 2018).

8 Peace v. Employment Sec. Com'n of North Carolina, 349 N.C. 315, 507 S.E.2d 272 (1998).

9 Matter of Behles, 2019-NMSC-016, 450 P.3d 920 (N.M. 2019).
As to notice, generally, see §§ 973 to 986.
Regarding the requirement of impartiality, see §§ 1011 to 1015.
As to the right to introduce evidence, see § 1004.
As to the right to cross-examine witnesses, see § 1005.
For discussion of the right to counsel, see § 999.
Due process requires adequate notice, a realistic opportunity to appear at a hearing, and the right to participate in a meaningful manner before one's rights are irretrievably altered. Matter of L.C.P., 2019 OK CIV APP 34, 456 P.3d 1142 (Div. 2 2019).
Due process requires a fair hearing, which includes reasonable notice of the opposing party's claims and an opportunity to rebut those claims. Matter of Estate of Bartelson, 2019 ND 107, 925 N.W.2d 416 (N.D. 2019).

10 Pittman v. Flanagan, 287 So. 3d 721 (La. Ct. App. 1st Cir. 2019).

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 998. Requirement of full evidentiary hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879, 3882

A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.[1] However, due process does not mandate full evidentiary hearings on all matters, and not all situations calling for procedural safeguards call for the same kind of procedure;[2] an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances.[3] There is no per se rule that an evidentiary hearing is required whenever a liberty or property interest, protected by due process, may be affected.[4] The parties' due process right to be heard may be fulfilled by the court's review of the briefs and supporting affidavits and materials submitted to the court.[5] In determining whether due process requires an evidentiary hearing, two factors that counsel in favor of a hearing are whether the court must resolve a dispute of material fact or weigh the credibility of witnesses.[6] Nonetheless, the hearing provided must be an orderly proceeding, adapted to the nature of the case,[7] in which the person to be affected has an opportunity to defend,[8] enforce, and protect his or her rights.[9]

Insofar as administrative proceedings are concerned, ordinarily, for purposes of due process, something less than an evidentiary hearing is sufficient prior to adverse administrative action.[10] Due process may require a trial-type hearing in fact-specific, adjudicatory decisions of an administrative body, but discretionary decisions involving potentially minor or limited incursions of property rights call for only limited procedural safeguards.[11] Although some kind of prior hearing may be necessary to guard against arbitrary impositions on interests protected by the 14th Amendment, nevertheless, where the state has preserved what has always been the law of the land, the case for administrative safeguards is significantly less compelling.[12]

Footnotes

[1] Akron, C. & Y. Ry. Co. v. U.S., 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923).

[2] Property Asset Management, Inc. v. Lazarte, 163 Conn. App. 737, 138 A.3d 290 (2016) (so long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens under the guise of due process).
Procedural due process does not require an evidentiary hearing on a motion when the legal claims do not turn on disputed facts. State v. Hidalgo, 241 Ariz. 543, 390 P.3d 783 (2017), cert. denied, 138 S. Ct. 1054, 200 L. Ed. 2d 496 (2018).

[3] Hargis v. Hargis, 2019 Ark. 321, 587 S.W.3d 208 (2019).

[4] Mikucka v. St. Lucian's Residence, Inc., 183 Conn. App. 147, 191 A.3d 1083 (2018).

[5] Hymas v. United States, 141 Fed. Cl. 735 (2019).

[6] In re Estate Boland, 2019 MT 236, 397 Mont. 319, 450 P.3d 849 (2019).

[7] Yolanda S. v. Illinois Department of Children and Family Services, 2019 IL App (1st) 171853, 431 Ill. Dec. 719, 128 N.E.3d 389 (App. Ct. 1st Dist. 2019); Charles Tolmas, Inc. v. Police Jury of Parish of Jefferson, 231 La. 1, 90 So. 2d 65 (1956); Edwards v. City of Sallisaw, 2014 OK 86, 339 P.3d 870 (Okla. 2014); State ex rel. Adams v. Superior Court of State, Pierce County, 36 Wash. 2d 868, 220 P.2d 1081 (1950); Simpson v. Stanton, 119 W. Va. 235, 193 S.E. 64 (1937).

[8] George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 (1933); Phoenix Metals Corp. v. Roth, 79 Ariz. 106, 284 P.2d 645 (1955) (overruled in part on other grounds by, Coulas v. Smith, 96 Ariz. 325, 395 P.2d 527 (1964)); In re Buchman's Estate, 123 Cal. App. 2d 546, 267 P.2d 73, 47 A.L.R.2d 291 (2d Dist. 1954).

[9] George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 (1933); American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932); Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425, 146 A.L.R. 1422 (1943).

[10] Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); Dixon v. Love, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Williams v. Board of Supervisors, Louisiana Community & Technical College Systems, 272 So. 3d 84, 367 Ed. Law Rep. 656 (La. Ct. App. 3d Cir. 2019).

[11] McIntyre v. Securities Commissioner of South Carolina, 425 S.C. 439, 823 S.E.2d 193 (Ct. App. 2018), cert. denied, (June 28, 2019).

[12] Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

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16B Am. Jur. 2d Constitutional Law § 999

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Constitutional Law
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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 999. Presence of person at trial and right to counsel under due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

A.L.R. Library

Appointment of counsel for attorney facing disciplinary charges, 86 A.L.R.4th 1071

Right of indigent defendant in paternity suit to have assistance of counsel at state expense, 4 A.L.R.4th 363

Right to counsel in contempt proceedings, 52 A.L.R.3d 1002

Comment Note.—Right to assistance by counsel in administrative proceedings, 33 A.L.R.3d 229

A party in a civil action may choose not to be present at the trial of the case and to be represented solely by counsel.[1] It is not essential to the jurisdiction of the court that the parties be present at all times during the trial.[2] Parties must be given the opportunity to be present, but if that opportunity is given, their absence during the trial does not affect the right to proceed.[3] Likewise, an accused has a fundamental right, as a matter of due process, to be present at all critical stages of his or her criminal trial.[4] Of course, any impairment of a defendant's credibility caused by the defendant's mandatory presence at trial does not violate due process.[5] However, the presence of a defendant at a critical stage of trial is a condition of due process to the extent that a fair and just hearing would be thwarted by his or her absence and to that extent only.[6]

Practice Tip:

The defendant's presence is not required, under the Due Process Clause and the applicable rule, for the correction of an illegal sentence, correction of a clerical error in a sentence, or resentencing pursuant to a mandate from the appellate court to resentence the defendant to the same sentence originally imposed while correcting other errors.[7]

Denying a criminal defendant access to counsel is a denial of due process of law, under both the federal and state constitutions.[8]

There is no general or absolute right to counsel in civil cases,[9] particularly where a defendant's deprivation of liberty is not at stake.[10] The stringent standards of appointment and effective assistance of counsel mandated by the Sixth Amendment do not apply to civil proceedings.[11] The constitutional right to appointed counsel provided for in the state and federal Constitutions generally is guaranteed only in criminal prosecutions, and the guarantee ordinarily does not, by virtue of the specific language of these provisions, apply to civil proceedings.[12] Nonetheless, there is a right to the appointment and assistance of counsel in various types of civil or administrative proceedings.[13]

A state court judge did not violate a patient's procedural due process rights in refusing to appoint independent attorney to represent the patient's interests in proceedings to determine whether to remove her artificial life support; the patient's life and liberty interests were adequately protected by the extensive process provided in the state courts, and the parties thoroughly advocated their competing perspectives on the patient's wishes.[14]

Footnotes

1 Am. Jur. 2d, Trial § 159.

2 Am. Jur. 2d, Trial § 159.

3 Am. Jur. 2d, Trial § 159.

4 State v. Frazier, 115 Ohio St. 3d 139, 2007-Ohio-5048, 873 N.E.2d 1263 (2007).

5 Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, 53 Fed. R. Evid. Serv. 337 (2000) (holding that the prosecution's comments during summation regarding the defendant's presence at trial and on the ability to fabricate that his presence afforded him did not deprive the defendant of due process even though a state statute required the defendant to be present at trial).

6 State v. Frazier, 115 Ohio St. 3d 139, 2007-Ohio-5048, 873 N.E.2d 1263 (2007).

7 U.S. v. Saenz, 429 F. Supp. 2d 1109 (N.D. Iowa 2006).

8 Cooke v. State, 97 A.3d 513 (Del. 2014).

9 Kinnan v. Sitka Counseling, 349 P.3d 153 (Alaska 2015); Stewart v. Rice, 2013 MT 55, 369 Mont. 203, 296 P.3d 1174 (2013).

10 Stewart v. Rice, 2013 MT 55, 369 Mont. 203, 296 P.3d 1174 (2013).

11 Watson v. Moss, 619 F.2d 775 (8th Cir. 1980).

12 Borror v. Department of Investment, 15 Cal. App. 3d 531, 92 Cal. Rptr. 525 (1st Dist. 1971).

[13] M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (termination of parental status); International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994); Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (termination of parental status); Humphrey v. Cady, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972) (involuntary commitment to a mental institution); Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (holding that due process prohibits a state from denying, solely because of an inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages).

[14] Schiavo ex rel. Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005), aff'd, 403 F.3d 1223 (11th Cir. 2005).

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 1000. Right to raise issues and defenses under due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.[1] Specifically, due process guarantees that every person be given an opportunity to explain, argue, and rebut any information that may lead to a deprivation of life, liberty, or property.[2] Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained.[3] The Constitution requires a certain modicum of adversary procedure even if the outcome is a foregone conclusion; access to the courts is an essential ingredient of the constitutional guarantee of due process.[4]

The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues.[5] Due process requires that there be an opportunity to present every available defense,[6] and a hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law.[7] However, due process is not violated by state procedures denying defendants the opportunity to put in defenses in that action so long as their claims can be raised elsewhere within the judicial system.[8]

Footnotes

[1] Turner v. State, 261 So. 3d 729 (Fla. 2d DCA 2018).
In state administrative proceedings, due process requires that parties be accorded a full and fair hearing on disputed fact issues. McNeill v. Phillips, 585 S.W.3d 109 (Tex. App. Houston 14th Dist. 2019), petition for review filed, (Jan. 2, 2020).

[2] Pena v. Rodriguez, 273 So. 3d 237 (Fla. 3d DCA 2019); State v. Johns, 2019 MT 292, 398 Mont. 152, 454 P.3d 692 (2019).

[3] Dicker v. Dicker, 189 Conn. App. 247, 207 A.3d 525 (2019).

[4] In re S.M.H., 2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807 (2019).

[5] Holt v. Virginia, 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290 (1965).

[6] Philip Morris USA Inc. v. Scott, 561 U.S. 1301, 131 S. Ct. 1, 177 L. Ed. 2d 1040 (2010); Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298 (1932).

[7] Tomayko v. Thomas, 143 So. 2d 227 (Fla. 3d DCA 1962).

[8] Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972).

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16B Am. Jur. 2d Constitutional Law § 1001

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 1001. Time of hearing under due process requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

Although a party must not be deprived of his or her property without a judicial hearing, the stage of the proceedings at which that hearing is to take place and the manner in which the cause of a party is to be brought before the judicial tribunal, provided that it is not an unreasonably inconvenient and embarrassing one, are matters within the legislative power.[1] Although due process of law implies not merely an opportunity to be heard but also an opportunity to be heard with reasonable promptness,[2] where only property rights are involved, the usual rule is that the mere postponement of a judicial inquiry into liability is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate.[3]

Observation;

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.[4]

Under the principle that the formality and procedural requisites for a due process hearing can vary, depending on the importance of the interest involved and the nature of the subsequent proceedings, the possible length of wrongful deprivation of benefits is an important factor in assessing the impact of official action on the private interests; thus, the rapidity of

administrative review of the denial of benefits is a significant factor in assessing the constitutional sufficiency of the entire process.[5] However, due process is not denied where postponement of a hearing is necessary to protect the public from contaminated food, from a bank failure, from misbranded drugs, to aid the collection of taxes, or to aid the war effort.[6]

Footnotes

1 Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); Hutchins v. Board of Sup'rs of Alcorn County, 227 Miss. 766, 87 So. 2d 54 (1956); Gillaspie v. Department of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953).

2 Barry v. Barchi, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979).

3 Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406, 15 U.C.C. Rep. Serv. 263 (1974); Goldenthal v. New York Tel. Co., 68 Misc. 2d 749, 327 N.Y.S.2d 732 (Sup 1972), order aff'd, 40 A.D.2d 825, 337 N.Y.S.2d 495 (2d Dep't 1972).

4 Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997); Ritter v. Cecil County Office of Housing and Community Development, 33 F.3d 323 (4th Cir. 1994).

5 Fusari v. Steinberg, 419 U.S. 379, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975).

6 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974).

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XIV. Due Process of Law

D. Hearing

2. Character and Sufficiency of Hearing

§ 1002. Time of hearing under due process requirements—Predeprivation and postdeprivation hearing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3879

A.L.R. Library

Construction and Application of Parratt-Hudson Doctrine, Providing That Where Deprivation of Property Interest Is Occasioned by Random and Unauthorized Conduct of State Officials, Procedural Due Process Inquiry Is Limited to Issue of Adequacy of Postdeprivation Remedies Provided by State, 89 A.L.R.6th 1

The opportunity to be heard in a meaningful time and in a meaningful manner may include the right to a predetermination hearing absent emergency circumstances.[1] However, due process does not always require a state to provide a predeprivation hearing prior to an initial deprivation of property.[2] When a postdeprivation hearing not only is feasible but will give the deprived individual a completely adequate remedy, due process does not require a right to a predeprivation hearing as well.[3] However, in situations where a state can feasibly provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of any postdeprivation tort remedy to compensate for the taking.[4]

When a state official commits acts that are random and unauthorized, procedural due process makes the state responsible only for providing postdeprivation remedies, because the state cannot feasibly provide for predeprivation process when the deprivation arises from random and unauthorized conduct.[5] There is no loss of property without due process if a state provides an adequate postdeprivation remedy for the loss.[6]

Additionally, failure to provide a predeprivation hearing does not violate due process in situations where a government official reasonably believed that immediate action was necessary to eliminate an emergency situation and the government provided adequate postdeprivation process.[7] In situations where a state feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking, but postdeprivation process can satisfy due process in limited cases when prompt action is required, an important government interest is involved, and there is a substantial assurance that the deprivation is not baseless or unwarranted.[8] Where the State acts to abate an emergent threat to public safety, postdeprivation process satisfies the Constitution's procedural due process requirement.[9] Whether a situation warrants postponement of a predeprivation hearing depends on a balancing of the importance of the private interest affected by the governmental action, the government's interest, and the risk of an erroneous deprivation.[10] Moreover, in determining what process is due, an account must be taken of the length and finality of the deprivation.[11] Thus, an important governmental interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demand prompt action justifying postponing the opportunity to be heard until after the initial deprivation; in determining how long a delay is justified in affording a postsuspension hearing and decision, it is appropriate to examine the importance of the private interest and harm to that interest occasioned by the delay, the justification offered by the government for the delay and its relation to the underlying governmental interest, and the likelihood that the interim decision may have been mistaken.[12]

Similarly, while a prior hearing is normally a prerequisite to the state's interference with a person's liberty, it may be delayed until some time after the deprivation has taken place,[13] particularly where there is a compelling state interest to warrant the postponement.[14] Thus, for example, due process was not violated by a city's 30-day delay in holding a hearing after a vehicle was towed; the private interest affected was the vehicle owner's interest in maintaining the use of the money between the time of paying impoundment and towing fees and the time of the hearing and the temporary deprivation of the use of the automobile itself, the delay in presenting evidence was unlikely to spawn significant factual errors and the straightforward nature of the issue of whether the car was illegally parked revealed little likelihood of erroneous deprivation, and the nature of the government interest in delay, one of administrative necessity, argued strongly in the city's favor.[15] Likewise, a state procedure for the removal of foster children from foster homes, under which foster parents are entitled to a preremoval conference and a postremoval hearing but are not entitled to a preremoval judicial hearing except as to children who have been in their foster care for 18 months or more, is not constitutionally inadequate by reason of the 18-month limitation, since the state legislature can properly determine that 18 months was the time at which temporary foster care begins to turn into a more permanent and family-like setting requiring procedural protection and/or judicial inquiry into the propriety of continuing foster care.[16]

Nonetheless, extraordinarily long delays may render a postdeprivation remedy inadequate for purposes of due process analysis.[17] For example, allegations that a minor child who was the suspected victim of physical abuse was removed from his parents and placed in protective custody with his maternal grandmother without a court order and that postdeprivation proceedings were not conducted until approximately seven weeks later supported a procedural due process claim against a county employee who investigated the allegations of abuse and placed the child with the grandmother.[18]

The required hearing is afforded where the judgment or order affecting liberty or property, although not itself preceded by a hearing, is reviewable in proceedings in which there is the right to be heard.[19] However, the view that due process does not require an opportunity to be heard before judgment if defenses may be presented upon appeal assumes that the appellate review affords an opportunity to present all available defenses, including a lack of proper notice, to justify the judgment or order complained of.[20]

CUMULATIVE SUPPLEMENT

Cases:

Under the *Parratt-Hudson* doctrine, a state actor's random and unauthorized deprivation of an interest protected by procedural due process cannot be challenged under § 1983 if the state provides an adequate post-deprivation remedy. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983. Dean for and on behalf of Harkness v. McKinney, 976 F.3d 407 (4th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

[1] Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989), on reh'g, 928 F.2d 920 (10th Cir. 1991).

[2] Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).
Due process does not necessarily require a hearing before property is taken. Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011).

[3] Ellis v. Sheahan, 412 F.3d 754 (7th Cir. 2005).

[4] Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991); Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

[5] Bolton v. Bryant, 71 F. Supp. 3d 802 (N.D. Ill. 2014).
Due process does not require predeprivation notice-and-hearing process when the state is in no position to provide it because the deprivation was due to an official's random or unauthorized act. DiLuzio v. Village of Yorkville, Ohio, 796 F.3d 604 (6th Cir. 2015).
Where the alleged deprivation arises from an unauthorized act of a governmental employee, it will not support a due process claim if adequate postdeprivation remedies are available. Your Place, LLC v. City of Troy, 122 A.D.3d 1148, 997 N.Y.S.2d 529 (3d Dep't 2014).

[6] Money Market Pawn, Inc. v. Wirth, 32 F. Supp. 3d 903 (N.D. Ill. 2014).

[7] United Pet Supply, Inc. v. City of Chattanooga, Tenn., 768 F.3d 464 (6th Cir. 2014).

[8] Shinault v. Hawks, 782 F.3d 1053 (9th Cir. 2015).

[9] Amaya v. City of San Antonio, 980 F. Supp. 2d 771 (W.D. Tex. 2013).

[10] First Nat. Bank & Trust, Wibaux, Mont. v. Department of Treasury, Comptroller of Currency, 63 F.3d 894 (9th Cir. 1995).

[11] Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 118 Ed. Law Rep. 590 (1997).

[12] Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) (holding also that even though there is a point at which an unjustified delay in completing a postdeprivation proceeding would become a constitutional violation, the significance of such a delay cannot be evaluated in a vacuum).

[13] Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970).

[14] Mignone v. Vincent, 411 F. Supp. 1386 (S.D. N.Y. 1976); Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 (W.D. Wis. 1969); In re Coates, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961).

[15] City of Los Angeles v. David, 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946 (2003).

[16] Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

[17] Cronin v. Town of Amesbury, 81 F.3d 257, 34 Fed. R. Serv. 3d 1496 (1st Cir. 1996).

[18] Brown v. Daniels, 128 Fed. Appx. 910 (3d Cir. 2005).

[19] Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); C.V.C. v. Superior Court, 29 Cal. App. 3d

909, 106 Cal. Rptr. 123 (3d Dist. 1973); In re Braier's Estate, 305 N.Y. 148, 111 N.E.2d 424 (1953).

[20] Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938).

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XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1003. Necessity under due process requirements of evidence in hearing, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3882, 3883

A.L.R. Library

Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Evidence Other Than Weapons or Personal Items, 56 A.L.R.6th 185

Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Personal Items Other Than Weapons, 55 A.L.R.6th 391

Failure of State Prosecutor to Disclose Exculpatory Physical Evidence as Violating Due Process—Weapons, 53 A.L.R.6th 81

Failure of State Prosecutor to Disclose Existence of Plea Bargain or Other Deals with Witness as Violating Due Process, 12 A.L.R.6th 267

Failure of State Prosecutor to Disclose Pretrial Statement Made by Crime Victim as Violating Due Process, 102 A.L.R.5th 327

Failure of State Prosecutor to Disclose Exculpatory Medical Reports and Tests as Violating Due Process, 101 A.L.R.5th 187

Failure of State Prosecutor to Disclose Exculpatory Ballistic Evidence as Violating Due Process, 95 A.L.R.5th 611

Failure of State Prosecutor to Disclose Fingerprint Evidence as Violating Due Process, 94 A.L.R.5th 393

Failure of State Prosecutor to Disclose Exculpatory Photographic Evidence as Violating Due Process, 93 A.L.R.5th 527

Comment Note.—Hearsay evidence in proceedings before federal administrative agencies, 6 A.L.R. Fed. 76

Procedural due process ordinarily requires decisions that would deprive a person of a liberty or property interest to be based on a modicum of evidence.[1] In an adjudicative context, due process entitles a person to a fact finding based on the record produced before a decision maker and disclosed to that person and an individualized determination of their interests; it also requires that the decision maker actually consider the evidence and the argument that the party presents.[2] Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules,[3] except in those rare instances where countervailing government interests dictate that such information should remain secret.[4]

Under the Due Process Clause of the Federal Constitution, an opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing.[5]

Admission of generic penalty phase testimony of a capital-murder defendant's ex-wife concerning prior unadjudicated violent conduct did not violate the defendant's right to due process, where the defendant received adequate notice of the evidence to be introduced and had a reasonable opportunity to respond; the defendant received notice through the prosecution's filing of a written notice of intent to offer evidence of the defendant's sexual and physical assaults upon his ex-wife, and through the ex-wife's sworn statement to prosecution and her testimony at a hearing held to determine the admissibility thereof, the defendant had an opportunity to confront his ex-wife at trial, and the jury was instructed as to the reasonable doubt requirement.[6]

There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.[7] Fabrication of evidence constitutes a violation of the right to a fair trial under the Due Process clauses of the Fifth, Sixth, Fourteenth Amendments.[8] The Due Process Clause of the 14th Amendment also forbids fundamental unfairness in the use of evidence, whether true or false.[9]

Suppression by the prosecution of evidence favorable to the accused, despite a request therefor, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[10] A former prisoner adequately pleaded a § 1983 claim that city police officers deprived him of due process by withholding exculpatory evidence from a prosecutor; the former prisoner alleged that the officers knowingly and intentionally switched test-fired bullets with bullets recovered from a murder victim's body and presented such bullets to the prosecutor under the pretense that they were recovered from the victim's body, then vouched for the same evidence at trial.[11] However, the alleged concealment of evidence by police officers in a prior criminal prosecution did not violate an arrestee's due process rights, for purposes of a subsequent 42 U.S.C.A. § 1983 claim brought after his convictions were reversed, where the allegedly suppressed evidence, including the time at which the police officers actually ran a records check during the initial traffic stop, was not material to the extortion, racketeering, and weapons charges and was either readily available to the arrestee before his criminal trial or was the type of evidence that the arrestee could have testified to at trial.[12]

Properly admitted hearsay evidence does not violate due process.[13] The Due Process Clause does not place a per se prohibition on the use of hearsay evidence; that the focus on the reliability of hearsay evidence may not accommodate a simple, predictable, bright-line rule does not alter the fact that reliability, not cross-examination, is the due process touchstone.[14] Unlike the Confrontation Clause, the Due Process Clause demands that evidence be reliable in substance, not that its reliability be evaluated in a particular manner.[15]

The Board of Immigration Appeals violated the due process rights of an alien seeking political asylum when it rejected her claims of past persecution based almost entirely upon hearsay statements of a State Department official in a letter that the alien received only days prior to the final hearing on her asylum application; the letter, which concerned the results of an "investigation" allegedly conducted by unknown individual into documents that the alien had submitted in support of her application, was in the nature of multiple hearsay authored by a government official with no personal knowledge of the matters reported, of the alleged investigator, or of how the alleged investigation was conducted.[16]

Footnotes

[1] Yarbrough v. Decatur Housing Authority, 941 F.3d 1022 (11th Cir. 2019).

[2] Brock v. Roadway Exp., Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987); de la Llana-Castellon v. I.N.S., 16 F.3d 1093 (10th Cir. 1994).

[3] Application of Eisenberg, 654 F.2d 1107, 32 Fed. R. Serv. 2d 660, 60 A.L.R. Fed. 915 (5th Cir. 1981); Collins v. Superior Court In and For Los Angeles County, 150 Cal. App. 2d 354, 310 P.2d 103 (2d Dist. 1957).

[4] Application of Eisenberg, 654 F.2d 1107, 32 Fed. R. Serv. 2d 660, 60 A.L.R. Fed. 915 (5th Cir. 1981); U.S. v. Isa, 923 F.2d 1300 (8th Cir. 1991).

[5] Southwestern Bell Telephone Co. v. Arkansas Public Service Com'n, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

[6] People v. Rundle, 43 Cal. 4th 76, 74 Cal. Rptr. 3d 454, 180 P.3d 224 (2008), as modified, (May 14, 2008) and (disapproved of on other grounds by, People v. Doolin, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)).

[7] Ramirez v. County of Los Angeles, 397 F. Supp. 2d 1208 (C.D. Cal. 2005).

[8] Hincapie v. City of New York, 2020 WL 362705 (S.D. N.Y. 2020).

[9] Blackburn v. State of Ala., 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960).

[10] Bell v. True, 413 F. Supp. 2d 657 (W.D. Va. 2006), aff'd, 260 Fed. Appx. 599 (4th Cir. 2008).

[11] Ricks v. Pauch, 322 F. Supp. 3d 813 (E.D. Mich. 2018).

[12] Ienco v. Angarone, 429 F.3d 680 (7th Cir. 2005).

[13] Commonwealth v. Imbert, 479 Mass. 575, 97 N.E.3d 335 (2018).

[14] Costa v. Fall River Housing Authority, 453 Mass. 614, 903 N.E.2d 1098 (2009).
Right to cross-examine witnesses, generally, see § 1005.

[15] Costa v. Fall River Housing Authority, 453 Mass. 614, 903 N.E.2d 1098 (2009).

[16] Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. 2003).

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16B Am. Jur. 2d Constitutional Law § 1004

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XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1004. Right to introduce evidence under due process requirements, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

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The right to present evidence is essential to the fair hearing required by the Due Process Clause.[1] In order to satisfy due process considerations, parties must be given a meaningful opportunity to present evidence.[2] That is, the due process right to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence[3] and have judicial findings based upon it.[4] However, it is not the duty of the court to inform litigants of the evidence they need to submit in order to support their motions.[5]

The opportunity to be heard, as is required by due process, includes the right to offer the testimony of witnesses;[6] the failure to give a party the chance to present witnesses or testify violates this fundamental right.[7] The right to call witnesses is one of the most important due process rights of a party, and accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done, especially when the witness sought to be excluded is a party's only witness or one of the party's most important witnesses, because if the witness is stricken, that party will be left unable to present evidence to support its theory of the case.[8]

Where a trial court acts within its discretion to exclude evidence, there is no due process violation.[9] Also, not every erroneous exclusion of evidence gives rise to a due process violation.[10] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.[11] To comport with the requirements of due process, evidence must be probative and its admission fundamentally fair.[12] Procedural fairness under due process principles does not require the admission of evidence which is only marginally relevant or which poses an undue risk of harassment, prejudice, or confusion of the issues.[13] Additionally, due process requires that evidence be reliable, and some evidence may be so unreliable that its admission violates due process.[14] The aim of the requirement of due process is not to exclude presumptively false or unreliable evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.[15]

Observation:

When evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense; an accused's constitutional right to present a defense is not an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence.[16]

The due process right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.[17] Where governmental action seriously injures an individual, and where the reasonableness of the action depends on fact findings, due process requires that the evidence used to prove the Government's case be disclosed to the individual so that he has an opportunity to show that it is untrue.[18] There is no hearing, in the constitutional sense, where the party does not know what evidence is being offered or considered and is not given an opportunity to test, explain, or refute such evidence.[19] Blindsiding a party by announcing on the day of the hearing that the court will entertain evidence at a hearing not noticed as an evidentiary hearing is the epitome of a due process violation.[20]

Generally, the right of due process gives a petitioner the opportunity to make an oral presentation to the court.[21] However, the reception of oral evidence is not a requirement of due process; if all facts and suggestions deemed necessary are presented by affidavits and in writing, the exclusion of oral evidence is not a violation of the guarantee of due process.[22] A state junior college was not denied due process when the president of the State Higher Education Services Corporation adopted, without any evidentiary hearing, the findings of the comptroller that some college students had not met the school's entrance requirements, thereby necessitating disallowance of a portion of the college's current tuition assistance, where the college had an opportunity to and did submit numerous written responses to the findings.[23]

A party is entitled to know the issues on which an administrative decision will turn and to be apprised of the factual material on which an administrative agency relies for its decision so that he or she may rebut it, and the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation; however, these salutary principles do not preclude a fact finder from observing strengths and weaknesses in the evidence that no party identified.[24]

Footnotes

1 Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969).

2 Aspic Engineering and Construction Company v. ECC Centcom Constructors, LLC, 268 F. Supp. 3d 1053 (N.D. Cal. 2017), aff'd, 913 F.3d 1162 (9th Cir. 2019) (adequate opportunity); Moore v. Griffin, 256 So. 3d 1201 (Ala. Civ. App. 2018) (one opportunity); Gaspar's Passage, LLC v. RaceTrac Petroleum, Inc., 243 So. 3d 492 (Fla. 2d DCA 2018); In re Guardianship of Barnhart, 290 Neb. 314, 859 N.W.2d 856 (2015); State v. Hegbloom, 2014 UT App 213, 362 P.3d 921 (Utah Ct. App. 2014).
Within the context of a due-process challenge, a court abuses its discretion only when the court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues. Riddle v. Riddle, 2018 ND 62, 907 N.W.2d 769 (N.D. 2018).

3 Jennings v. Mahoney, 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971); In re Robert S., 2009 ME 18, 966 A.2d 894 (Me. 2009); Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953); In re International Workers Order, 280 A.D. 517, 113 N.Y.S.2d 755 (1st Dep't 1952), order aff'd, 305 N.Y. 258, 112 N.E.2d 280 (1953).
Due process requires nothing more than giving the appellant a hearing to present all relevant evidence. Keeton by and Through Gray v. Ocean Springs School Board, 281 So. 3d 889, 371 Ed. Law Rep. 1238 (Miss. Ct. App. 2019).
The right of a litigant to in-court presentation of evidence is a fundamental component of due process. Interest of S.L., 2019 PA Super 10, 202 A.3d 723 (2019).

4 Baltimore & O.R. Co. v. U.S., 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936); Butler v. State, 217 Miss. 40, 63 So. 2d 779 (1953).

[5] In re Guardianship of Barnhart, 290 Neb. 314, 859 N.W.2d 856 (2015).

[6] Estate of Derzon, 2018 WI App 10, 380 Wis. 2d 108, 908 N.W.2d 471 (Ct. App. 2018).
Integral to the state constitutional rights of due process and unfettered access to the courts is the ability to present witnesses and other lawful evidence. Thomas v. Johnson, 329 Ga. App. 601, 765 S.E.2d 748 (2014).

[7] E-Commerce Coffee Club v. Miga Holdings, Inc., 222 So. 3d 9 (Fla. 4th DCA 2017).

[8] Gaspar's Passage, LLC v. RaceTrac Petroleum, Inc., 243 So. 3d 492 (Fla. 2d DCA 2018).

[9] State v. Bergquist, 2019 VT 17, 211 A.3d 946 (Vt. 2019).

[10] Virginia Board of Medicine v. Zackrison, 67 Va. App. 461, 796 S.E.2d 866 (2017).

[11] In re J.S., 10 Cal. App. 5th 1071, 217 Cal. Rptr. 3d 91 (4th Dist. 2017).

[12] Godfrey v. Lynch, 811 F.3d 1013 (8th Cir. 2016).

[13] People v. Lewis, 2017 IL App (1st) 150070, 414 Ill. Dec. 879, 81 N.E.3d 145 (App. Ct. 1st Dist. 2017).

[14] More v. State, 880 N.W.2d 487 (Iowa 2016).

[15] State v. Oldson, 293 Neb. 718, 884 N.W.2d 10 (2016).

[16] State v. Muckerheide, 2007 WI 5, 298 Wis. 2d 553, 725 N.W.2d 930 (2007).

[17] Froehlich v. Ohio State Med. Bd., 2016-Ohio-1035, 61 N.E.3d 568 (Ohio Ct. App. 10th Dist. Franklin County 2016).

[18] J.E.C.M. by and Through His Next Friend Saravia v. Lloyd, 352 F. Supp. 3d 559 (E.D. Va. 2018).

[19] Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); Douglas County v. State Bd. of Equalization and Assessment, 158 Neb. 325, 63 N.W.2d 449 (1954); Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954); State in Interest of Pilling v. Lance, 23 Utah 2d 407, 464 P.2d 395 (1970).

[20] Williams v. Sapp, 255 So. 3d 912 (Fla. 1st DCA 2018).
Notice, generally, see §§ 973 to 986.

[21] Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019).

[22] Appeal of Lush, 16 Misc. 2d 137, 185 N.Y.S.2d 195 (Sup 1957), order aff'd, 8 A.D.2d 644, 8 A.D.2d 678, 185 N.Y.S.2d 202 (3d Dep't 1959).

[23] Interboro Institute, Inc. v. Foley, 985 F.2d 90, 80 Ed. Law Rep. 792 (2d Cir. 1993).

[24] Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974).

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XIV. Due Process of Law

D. Hearing

3. Evidence and Presumptions

§ 1005. Right to confront and cross-examine witnesses under due process requirements

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Condition interfering with accused's view of witness as violation of right of confrontation, 19 A.L.R.4th 1286

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742

The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.[1] In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.[2] Additionally, due process depends on, in part, whether the notice was sufficient to provide the party a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence.[3] The denial of the opportunity to cross-examine that witness works as a substantial deprivation upon a petitioner's right to a fair hearing.[4]

The Sixth Amendment right of confrontation is made applicable to the states through the 14th Amendment.[5] However, confrontation and cross-examination are not rights universally applicable to all proceedings.[6] Not every situation requires a formal hearing accompanied by the full rights of confrontation and cross-examination to comport with procedural due process requirements;[7] in some circumstances the absence of an opportunity for cross-examination is consistent with due process.[8] The Sixth Amendment right to confront witnesses and its state equivalent do not apply to civil cases.[9]

Practice Tip:

To maintain a due process claim based on inability to cross-examine a witness, the party must demonstrate that there is a reasonable likelihood that the outcome might have been different.[10]

The compulsory attendance of witnesses, both in a criminal and civil trial, is also a vital part of the American concept of due process and a fair hearing.[11] The government's recognition of its interest in having persons appear in court by paying them for their participation in judicial proceedings does not require, under the Due Process Clause of the Fifth Amendment, that it make payment of the same nature and extent to persons who are held available for participation in judicial proceedings should it prove to be necessary; that the government pays for one stage does not require that it pay in like manner for all stages.[12]

Observation:

The opportunity to be heard at an evidentiary hearing, as required by due process, requires time to secure the attendance of witnesses.[13]

Footnotes

1 Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969); Ring v. Erickson, 983 F.2d 818, 38 Fed. R. Evid. Serv. 493 (8th Cir. 1992) (child abuse hearing); In re DeLeon J., 290 Conn. 371, 963 A.2d 53 (2009).
Due process protections encompass procedural safeguards including the right to cross-examine adverse witnesses. In re Adoption of Child ex rel. M.E.B., 444 N.J. Super. 83, 130 A.3d 1262 (App. Div. 2016).
Effective cross-examination is integral to due process. Farah v. Hertz Transporting, Inc., 196 Wash. App. 171, 383 P.3d 552 (Div. 1 2016).
Where a person's liberty is at stake, the opportunity to confront witnesses and reveal problems with their testimony is an important component of due process. U.S. v. Jordan, 742 F.3d 276 (7th Cir. 2014).

2 Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); Ching v. Mayorkas, 725 F.3d 1149 (9th Cir. 2013); Doe v. University of Mississippi, 361 F. Supp. 3d 597, 364 Ed. Law Rep. 139 (S.D. Miss. 2019); Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 434 P.3d 1265 (2019); Eric H. v. Ashley H., 302 Neb. 786, 925 N.W.2d 81 (2019); Jensen v. New York City Department of Finance, 60 Misc. 3d 513, 75 N.Y.S.3d 876 (Sup 2018); Interest of S.L., 2019 PA Super 10, 202 A.3d 723 (2019); Arnell v. Arnell, 416 S.W.3d 188 (Tex. App. Dallas 2013).

3 Prokop v. Lower Loup Natural Resources District, 302 Neb. 10, 921 N.W.2d 375 (2019).
Notice, generally, see §§ 973 to 986.

4 In re Brown, 54 Misc. 3d 515, 43 N.Y.S.3d 701 (N.Y. City Civ. Ct. 2016).

5 Hape v. State, 903 N.E.2d 977 (Ind. Ct. App. 2009).

6 Brock v. Roadway Exp., Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987); Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

[7] Barri v. Workers' Comp. Appeals Bd., 28 Cal. App. 5th 428, 239 Cal. Rptr. 3d 180 (4th Dist. 2018).

[8] Dubois v. Department of Agriculture, Conservation and Forestry, 2018 ME 68, 185 A.3d 743 (Me. 2018).

[9] In re Estate of Clinger, 292 Neb. 237, 872 N.W.2d 37 (2015).

[10] Hopkins v. Wollaber, 2019-NMCA-024, 458 P.3d 583 (N.M. Ct. App. 2018).

[11] People of State of N. Y. v. O'Neill, 359 U.S. 1, 79 S. Ct. 564, 3 L. Ed. 2d 585 (1959); Drogaris v. Martine's Inc., 118 So. 2d 95 (Fla. 1st DCA 1960).

[12] Hurtado v. U.S., 410 U.S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973).

[13] Williams v. Sapp, 255 So. 3d 912 (Fla. 1st DCA 2018).

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XV. Full Faith and Credit

A. In General

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Research References

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